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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945

No. 556

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, PETITIONER,

*vs.*

EDWARD C. WOLFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PETITION FOR CERTIORARI FILED OCTOBER 23, 1945.

CERTIORARI GRANTED NOVEMBER 19, 1945.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

# No.

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*vs.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY**

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant

SUMMONS—Filed November 22, 1934

The State of South Dakota to the Above Named Defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which complaint is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber at his office in the City of Rapid City in the County of Pennington in said State of South Dakota, within thirty days after the service of this Summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within thirty days after the service of this Summons upon you, the plaintiff in this action will apply to the Court for the relief demanded in the said complaint.

Dated June 15, 1934.

H. F. Fellows, Attorney for Plaintiff, Pennington County, South Dakota.

I hereby become surety for costs in the above entitled action.

Hazel W. Fellows.

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[fol. 6] IN CIRCUIT COURT OF PENNINGTON COUNTY

[Title omitted]

COMPLAINT—Filed November 22, 1934

For cause of action, plaintiff alleges:

I

That the plaintiff, Edward C. Wolfe, is a resident, citizen and inhabitant of the State of Ohio.

II

That the Order of United Commercial Travelers of America, a corporation, defendant herein, is an insurance corporation duly organized under and by virtue of the laws of the State of Ohio, and is a resident, citizen and inhabitant of the State of Ohio, and duly licensed to do business within the State South Dakota.

III

That on or about the 19th day of August, 1920, in consideration of the payment by the insured of the premiums demanded, the defendant did indemnify and insure Ford Shane in the sum of Six Thousand Three Hundred Dollars ($6,300.00) for death through external, violent and accidental means, termed an accident, which shall be occasioned by the said accident alone and independent of all other causes. That such insurance was evidenced by written contracts signed and issued by the defendant corporation and by it designated as certificate No. 169655.

IV

That Elizabeth Shane, the mother of said Ford Shane, was at the time of the death of said Ford Shane, as hereinafter set forth, the duly designated beneficiary and the person entitled in case of death by accident under the provisions of said policy to receive the entire payment and benefits thereunder.

V

That on the 8th day of May, 1931, the said Ford Shane was killed by an accident through external, violent and accidental means, and that his death was occasioned by said accident alone and independent of all other causes.

VI

That prior to the commencement of this action, and on or about June 16, 1931, said Elizabeth Shane gave to defendant due notice of such death and loss, and demanded payment in accordance to said contract, but that defendant failed and refused to pay the sum due thereunder, or any amount whatsoever.

VII

That prior to the commencement of this action, said Elizabeth Shane duly sold, transferred and assigned in writ-
[fols. 7-15] ing to this plaintiff all of her right, title and interest in and to said policy, or certificate, and any and all rights thereunder and proceeds thereof, with authority to enforce collection thereon and thereof and to take and do all necessary steps and acts to that end; and that there is now due to plaintiff by reason thereof the sum of Six Thousand Three Hundred Dollars ($6,300.00) with statutory interest thereon from June 16, 1931.

Wherefore, Plaintiff demands judgment against the defendant for the sum of Six Thousand Three Hundred Dollars ($6,300.00) with interest thereon at 7% per annum from June 16, 1931, together with the costs and disbursements of this action.

H. F. Fellows, Attorney for Plaintiff.

*Duly sworn to by H. F. Fellows. Jurat omitted in printing.*

[File endorsement omitted.]

---

[fol. 16] In Circuit Court of Pennington County

[Title omitted]

Service of Amended Answer—Filed October 19, 1940

Service of Amended Answer of Defendant verified under date of May 15, 1940, by copy is hereby admitted to have been made on the 20th day of May, 1940. Also, it is stipulated on the part of the plaintiff that the defendant may file such Amended Answer in this action.

H. F. Fellows, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 17] IN CIRCUIT COURT OF PENNINGTON COUNTY

[Title omitted]

AMENDED ANSWER—Filed October 19, 1940

Defendant answers the Complaint of the plaintiff as follows:

I

Defendant denies each and every allegation in said complaint contained not hereinafter specifically admitted.

II

Defendant admits and states the fact to be that, at all the times mentioned in the complaint in this action, defendant has been and now is a fraternal benefit order or society organized under the laws of the State of Ohio, and during all of such times has been authorized to do business in the state of South Dakota as a foreign fraternal benefit society, and that it was authorized to indemnify and insure persons accepted by it against death effected through external, violent and accidental means, termed an accident, which shall be occasioned by the accident alone and independent of all other causes, in accordance with the terms of its constitution, by-laws, and articles of incorporation, then in force, or thereafter adopted by it.

III

Defendant admits that on or about August, 1920, it accepted Ford Shane for indemnity and insurance against death, and thereby did insure the said Ford Shane in the [fol. 18] sum of Six Thousand Three Hundred Dollars for death effected through external, violent and accidental means, termed an accident, and occasioned by the accident alone, and independent of all other causes, in accordance with the provisions of the Constitution, By-laws and Articles of Incorporation of the defendant order, then existing, or thereafter duly adopted. Defendant admits and alleges that the defendant issued to the said Ford Shane an "Insurance Certificate, which certificate, together with the constitution, by-laws and articles of incorporation then existing, or thereafter adopted by the defendant, constituted the contract of insurance between the defendant and the said Ford Shane.

IV

Defendant admits that the said Elizabeth Shane was thereafter and before the death of the said Ford Shane named and designated as the beneficiary of said insurance, and that she is the mother of the said Ford Shane.

V

Defendant alleges that the said contract of insurance between the said defendant and the said Ford Shane provided that the death benefit under said policy should be paid as follows and not otherwise, to-wit: Five Thousand Dollars within ninety days from the receipt by the Supreme Executive Committee of satisfactory final proofs of death of the insured and Thirteen Hundred Dollars in weekly installments of $25.00 each beginning within ninety days from the receipt of such final proofs of death, and said provisions of the contract are not in any way modified or nullified by any other provisions of said contract.

VI

Defendant admits that the said Elizabeth Shane furnished to the Supreme Executive Committee of the defendant proofs of the death of the said Ford Shane on or about June 1st, 1931, and not before that date.

VII

Defendant further alleges that the said contract of insur-
[fols. 19-20] ance between the defendant and the said Ford Shane expressly provided that the defendant order shall not be liable for death resulting from medical, mechanical, or surgical treatment, nor for death resulting from the intentional taking of medicine or drugs. Defendant admits that the said Ford Shane died on or about May 8, 1931, and alleges that the death of the said Ford Shane resulted from medical, mechanical and surgical treatment which was being administered to him at the request of the said Ford Shane, and resulted from the intentional taking of medicine and drugs on the part of the said Ford Shane.

IX

Defendant further alleges that said contract of insurance between the defendant and said Ford Shane contained the

further provision, which was not in any way modified by any of the other provisions of said contract, to-wit: "Nor shall benefits under this Article (meaning the article of the constitution of the defendant corporation which provided for making contracts of insurance), be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability, or loss." Defendant alleges and states that external, violent and accidental means, producing bodily injury, was not the proximate, sole and only cause of the death of the said Ford Shane.

[fol. 21] XI.

Defendant further alleges as a complete defense to this action, that it at all times has been a Fraternal Benefit Society created, organized and existing under the laws of the State of Ohio, and that at all times since the year 1919 it has been duly and regularly admitted to transact business in the State of South Dakota as a foreign fraternal benefit society. That on or about July 31, 1920, the said Ford Shane made application in writing for membership and insurance in the defendant Order, such application having been submitted to Council No. 516 of Rapid City, South Dakota, which was a local council of the defendant Order. Said application was duly accepted by the defendant Order, and on August 19, 1920, defendant issued to the said Ford Shane an insurance certificate numbered 169655, dated on said date, which was in words and figures as follows:

Class A

Insurance Certificate

The Order of United Commercial Travelers of America

Columbus, Ohio

An Association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under "Class A," beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the

rights and benefits which may be provided for such "Class A" Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payments of benefits, and any [fol. 22] changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 19th day of August A. D. 1920.

W. B. Emerson, Supreme Counselor; Walter D. Murphy, Supreme Secretary. (Seal.)

That the said application of the said Ford Shane contained the statement over his signature in the following language:

> "I hereby agree to accept the Certificate of Membership and Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order as they now exist, or as they may hereafter be added to, revised or amended."

That on October 23, 1922, the said Ford Shane had been suspended from membership in the defendant Order, and on said date he made application in writing for reinstatement to membership. Such application contained the statement, as follows:

> "I also agree to accept the Certificate of Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order, as they now exist, or as they may hereafter be added to, revised or amended."

Thereafter, to-wit: On December 21st, 1922, defendant Order issued to the said Ford Shane a new insurance certifi-

cate, dated on said date, and numbered 169655, which aside from the date was in all respects in the same form and of the same content as the certificate of August 19, 1920, but had the words added thereto, to-wit:

> "This certificate supersedes all insurance certificates issued of a prior date bearing this number."

Defendant admits and alleges that the said Ford Shane kept said certificate in force until his death on or about May 8, 1931.

That the Constitution of the defendant Order, at the time [fol. 23] said Ford Shane first made his application for membership and insurance in the Order, and ever since, contained the following provision, which was not in any way modified or superseded by any other provision therein, or otherwise, being Section 11 of Article IV of the Constitution, to-wit:

> "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for such benefits is disallowed by the Supreme Executive Committee.
>
> "No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance as the same are now in force or may be hereafter enacted."

A copy of said provision of the Constitution was indorsed upon said certificate No. 169655 issued to said Ford Shane.

That the benefits claimed under the said certificates issued to the said Ford Shane were disallowed by the Supreme Executive Committee of the defendant on June 8, 1931, and notice of such disallowance promptly sent the beneficiary of the insurance of the said Ford Shane; that this action was not commenced prior to June 15, 1934, and plaintiff's right of action is barred because he did not commence his action within the said time provided by the Constitution of the defendant Order.

Defendant further alleges that Section 11 of Article IV of the Constitution of the defendant Order, referred to above, is valid and binding upon the members of the defendant

Order by and under the laws of the state of Ohio; that the highest court of that state has held and decided that a fraternal benefit society, by its constitution or by-laws, may limit the time within which suit must be brought to recover for benefits promised members. That it is the settled law of the State of Ohio that a fraternal benefit society may, by its constitution and by-laws, limit the time within which a suit may be brought for benefits growing out of membership, [fols. 24-25] and that a limitation of six months is a reasonable time. That plaintiff in his application for membership and insurance specifically agreed to the said provision in the Constitution which limits the time for bringing suit to six months as aforesaid, and Elizabeth Shane, the beneficiary under said certificate, plaintiff's assignor, complied with said provision by commencing an action to recover on said certificate for the benefits sought in this action, in the Circuit Court of Pennington County, South Dakota, on June 17, 1931, which action, after same was removed to federal court, the said Elizabeth Shane voluntarily dismissed and discontinued, all as more fully set forth in another paragraph of this answer. That the plaintiff is thereby estopped to assert that the period for commencing action as prescribed by the Constitution is not a reasonable time. That the laws of the State of Ohio are binding upon and govern the rights of all claiming benefits under the said certificate of insurance issued the said Ford Shane, and are binding upon and govern the rights of the plaintiff herein. That this is true without regard to where the said certificate was issued, or to where the said insured was domiciled at any time, and in any forum in which the beneficiary, or her assignor, may go to enforce claimed rights under said certificate.

That this is true because Section 1 of Article IV of the Constitution of the United States provides that "Full faith and credit shall be given in each State to the Public Acts, Records and judicial proceedings of every other state." That defendant relies upon said provision of the United States Constitution in this action, and claims the right to be protected thereunder. That to deny that said provision of the constitution of the defendant Order, which limits the time to bring suits on certificates of insurance to six months as aforesaid, is binding upon plaintiff and valid, would be a violation of said Section 1 of Article IV of the federal constitution, and a violation of defendant's rights thereunder.

[fol. 26] Wherefore, defendant asks the judgment of the Court that plaintiff recover nothing in this action, and that defendant have judgment against plaintiff for its costs and disbursements herein.

Sutherland & Payne, Attorneys for Defendant;
Byron S. Payne, a Member of Said Firm.

[fol. 27] [File endorsement omitted.]

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[fol. 28] In Circuit Court of Pennington County

[Title omitted]

Requested Findings of Fact and Conclusions of Law and Order Thereon—Filed January 10, 1944

The Defendant requests the Court to make the following Findings of Fact:

I

The Defendant is a fraternal benefit order or society organized under the laws of the State of Ohio, and during all the period from the beginning of the year 1920 until on and after the year 1931, was authorized to do business in the State of South Dakota as a foreign fraternal benefit society, and was authorized to indemnify and insure persons accepted by it against death, effected through external, violent and accidental means, termed an accident, which shall be occasioned by the accident alone and independent of all other causes, in accordance with the terms of its constitution, by-laws and articles of incorporation, then in force, or thereafter adopted by it.

II

On or about August 19, 1920, the defendant corporation accepted Ford Shane for indemnity and insurance against death, and thereby did insure the said Ford Shane in the sum of Six Thousand, Three Hundred ($6,300) Dollars for death effected through external, violent and accidental means, termed an accident, and occasioned by the accident alone and independent of all other causes, in accordance with the provisions of the constitution, by-laws, and ar-

[fol. 29] ticles of incorporation of the defendant Order,

then existing or thereafter duly adopted. On or about said date, Defendant issued to the said Ford Shane an "insurance certificate", which certificate together with the constitution, by-laws and articles of incorporation, then existing or thereafter adopted by the Defendant, constituted the contract of insurance between the Defendant and the said Ford Shane.

III

On October 23, 1922, the said Ford Shane had been suspended from membership in the defendant Order and by reason thereof his insurance certificate issued by the defendant Order had lapsed. On the date above named the said Ford Shane made application in writing for reinstatement to membership in the defendant Order, and to have his insurance certificate reinstated in force. The application of the said Ford Shane for reinstatement was accepted by the defendant Order, and on December 21, 1922, the defendant Order reissued to the said Ford Shane the said insurance certificate bearing the same number as the original certificate. And the said insurance certificate originally issued on August 19, 1920, and as reissued on December 21, 1922, together with the constitution, by-laws, and articles of incorporation of the defendant Order, together with the application for insurance signed by the said Ford Shane, constituted the contract between the defendant Order and said Ford Shane, and govern the payment of benefits; and any changes, additions or amendments to said constitution, by-laws or articles of incorporation thereafter duly made bound said defendant Order and said insured member and his beneficiary and governed and controlled the contract in all respects.

IV

The said Ford Shane in his application for reinstatement of October 23, 1922, designated his mother, Elizabeth Shane, as the beneficiary of the insurance provided for by [fols. 30-31] said insurance certificate.

V

The said Ford Shane died on May 8, 1931, and said insurance certificate issued to him by the defendant Order was kept in force and was in effect up to and at the time of the death of the said Ford Shane.

VI

The said Elizabeth Shane promptly gave notice to the defendant Order of the death of the said Ford Shane and submitted proofs of death to the defendant Order on or about June 1, 1931. On June 8, 1931, the Supreme Executive Committee of the defendant Order disallowed and rejected the claim of the said beneficiary, Elizabeth Shane, for insurance under said insurance certificate, and notice of such disallowance was promptly sent to the said Elizabeth Shane.

VII

This action was begun by the service of summons on the defendant corporation on June 16, 1934, and the summons in the action was issued and bears date June 15, 1934.

[fol. 32]

X

The insurance contract between the defendant Order and the said Ford Shane indemnified against death and injury to the said Ford Shane only when such death or injury was occasioned by external, violent and accidental means as the sole cause of such death or injury; and the death of the said Ford Shane was not caused by external, violent and accidental means, as the sole cause of such death.

XI

The said insurance contract between the said Ford Shane and the defendant Order provided that the defendant Order should not be liable for death resulting from medical, mechanical or surgical treatment, nor for death resulting from the intentional taking of medicine or drugs. The death of the said Ford Shane did result from medicinal and surgical treatment and from the intentional taking of medicine and drugs.

XII

The insurance contract between the said Ford Shane and the defendant Order further provided that no suit or proceeding, either at law or in equity, shall be brought to recover any benefits under the insurance certificate after six months from the date the claim for such benefits is disallowed by the Supreme Executive Committee, and this action was not brought within six months from the date the claim for such benefits was disallowed by the Supreme

Executive Committee. The beneficiary on said insurance contract brought an action to recover benefits under said contract about five weeks after the said Supreme Executive Committee of the defendant Order disallowed her claim for benefits, and said limitation of six months within which to bring action for benefits under said insurance cer- [fol. 33] tificate was a reasonable provision under the circumstances affecting such claim for benefits, and is binding upon the beneficiary and those in privity with her, and this plaintiff.

XIII

The insurance contract between the said Ford Shane and the defendant Order provided as follows:

> "No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance as the same are now in force or may be hereafter enacted."

No provisions of the said insurance contract have been legally waived by any representative of the defendant corporation.

CONCLUSIONS OF LAW

Plaintiff asks the Court to conclude as the law applicable to the facts of this case as follows:

I

Plaintiff has brought this action too late because he did not bring same within six months after the claim for benefits under the insurance certificate was disallowed by the Supreme Executive Committee of the defendant Order, and this action is barred by the contract limitation of six months for the bringing of an action in said insurance contract.

II

Plaintiff is estopped by the decision and judgment of the United States Circuit Court of Appeals above described from claiming that the death of Ford Shane was caused by external, violent and accidental means; and is estopped from claiming in this action that the death of Ford Shane was not due to medical and surgical treatment, and from

the intentional taking of medicine and drugs, and the plaintiff, as the assignee of Elizabeth Shane, is bound by the determination and decision of the said Circuit Court of Appeals upon said points and questions of fact and law.

[fol. 34] III

The death of Ford Shane was not caused by, and the result of, external, violent and accidental means as the sole and only cause of death.

IV

The death of Ford Shane was caused by medical and surgical treatment and by the intentional taking of drugs and medicine.

V

Plaintiff is not entitled to recover in this action, and it should be so adjudged, and the defendant should recover its costs.

Respectfully submitted: Byron S. Payne, Attorney for Defendant.

Refused. Turner M. Rudesill, Judge.

[File endorsement omitted.]

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[fol. 35] In Circuit Court of Pennington County

[Title omitted]

Request by Defendant for Additional Findings of Fact and Order Thereon—Filed January 10, 1944

Comes now the Defendant and requests the Court to make the following Findings of Fact, additional to those already requested to be numbered and known as Defendant's Requested Findings of Fact, Number III-a and III-b, respectively, and such findings to be in the following form:

Defendant's Requested Finding Number III-a

The insurance granted the said Ford Shane, as set forth, in the Defendant's Requested Findings numbered I, II, and III, was granted to the said Ford Shane upon a written

application, which was signed by the said Ford Shane in the State of South Dakota, and forwarded by mail to the defendant corporation at its home office in Columbus, Ohio. Likewise, the application for reinstatement made by the said Ford Shane for the reinstatement of his insurance was signed by the said Ford Shane in the State of South Dakota, and was forwarded to the home office of the defendant corporation at Columbus, Ohio. Said original application of the said Ford Shane for insurance contained the statement over his signature in the following language:

> "I hereby agree to accept the Certificate of Membership and Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order as they now exist, or as they may hereafter be added to, revised or amended."

Said application of Ford Shane for reinstatement contained the statement over his signature as follows:

> "I also agree to accept the Certificate of Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order, as they now exist, or as they may hereafter be added to, revised or amended."

[fol. 36] Defendant's Requested Finding Number III-b

The certificate of insurance issued to Ford Shane on August 19, 1920 was in the following form:

Class A

Insurance Certificate

The Order of United Commercial Travelers of America

Columbus, Ohio

An association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under "Class

A," beginning at twelve (12) o'clock, noon, Standard Time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such "Class A" Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

This certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payments of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 19th day of August A. D. 1920.

W. B. Emerson, Supreme Counselor; Walter D. Murphy, Supreme Secretary. (Seal.)

The reinstatement certificate of insurance issued by the defendant corporation to Ford Shane on December 21, 1922 was in the same form as the original certificate, except that it was dated December 21, 1922. The application of the [fol. 37] said Ford Shane for insurance, and the later application for reinstatement for such insurance, were both accepted by the Defendant corporation at Columbus, Ohio, and the certificates of insurance were issued by the defendant corporation at said place, and the insurance for the said Ford Shane became effective and went into force upon the acceptance of the application of Ford Shane therefor and the issuance of the certificate therefor, and the issuance of such certificate was the last act necessary to be done to make such insurance effective. That the contract between said Ford Shane and the defendant corporation was an Ohio contract, and is governed by the laws of Ohio.

Respectfully requested, Byron S. Payne, Attorney for Defendant.

The making of the within and foregoing requested Findings of Fact numbered and designated as Defendant's Requested Finding of Fact numbered III-a, and Defendant's

Requested Finding of Fact numbered III-b, is hereby refused and denied by the Court, to which ruling the defendant at the time excepted and the exception is allowed.

Dated this 6th day of January, 1944.

By The Court, Turner M. Rudesill, Judge.

[File endorsement omitted.]

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[fol. 38] In Circuit Court of Pennington County

[Title omitted]

Order Denying and Refusing Defendant's Requested Findings of Fact and Conclusions of Law and Allowing an Exception Thereto—Filed January 10, 1944

The Defendant, The Order of United Commercial Travelers of America, a corporation, duly submitted to the Court, prior to the decision of the case, requested Findings of Fact and Conclusions of Law, and the Court having duly considered same, and being of the opinion that such requested Findings and Conclusions should be denied and refused, it is now Ordered that the said requested Findings and Conclusions of the Defendant be filed as part of the record in this case, and that such Requested Findings of Fact and Conclusions of Law, be, and the same, are hereby in all things denied and refused.

To this ruling of the Court, the Defendant at the time duly excepted, and the exception is allowed.

Dated this 6th day of January, 1944.

By the Court: Turner M. Rudesill, Judge.

Attest: W. B. Andrus, Clerk. (Seal.)

[File endorsement omitted.]

---

[fol. 39] In Circuit Court of Pennington County

[Title omitted]

Stipulation as to Submission—Filed April 4, 1944

It is hereby stipulated by and between the plaintiff through his attorney, H. F. Fellows, and the defendant through its attorney, Byron S. Payne, that the above en-

titled action may be submitted for determination and decision to the Honorable Turner M. Rudesill as Judge of the Circuit Court of the Seventh Judicial Circuit upon the record of the action as it was made up for submission to the late Honorable A. R. Denu, then Judge of said Court, on or about the 5th day of February, 1942, and the Reporter's transcript of the proceedings for the submission of the action to the Court at such time, and that no further or other trial of said case before the Honorable Turner M. Rudesill shall be necessary or had, but that the Court may proceed to make its decision in the action upon the said record and transcript.

Dated November 29th, 1943.

H. F. Fellows, Attorney for Plaintiff; Byron S. Payne, Attorney for Defendant.

[File endorsement omitted.]

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[fol. 40] IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant

**Decision**—Filed April 4, 1944

The issue herein having been duly submitted to the Court, Hon. A. R. Denu, Judge, without a jury on the 5th day of February, 1942, plaintiff appearing by his attorney, H. F. Fellows and the defendant appearing by its attorney Byron S. Payne; and the said A. R. Denu having died prior to the rendition of a decision herein, and it being then duly stipulated between the said attorneys for the parties that the issues herein might be submitted for determination and decision to Hon. Turner M. Rudesill, the present Judge of the Circuit Court of the Seventh Judicial Circuit, upon the record of the action as it was made up for submission to the said A. R. Denu, Judge; and the said Turner M. Rudesill, Judge, having examined the said record and the briefs

submitted by the respective parties, and being fully advised in the premises, does hereby make his findings of fact and conclusions of law, which constitute the decision herein:

## Findings of Fact

### I

That the defendant, The Order of United Commercial Travelers of America is and was at all of the times hereinafter mentioned an insurance corporation organized and existing according to law and licensed to do business within the State of South Dakota.

### II

That on or about August 19, 1920, in consideration of the payment by the insured of the premium demanded, defendant executed, issued and delivered to Ford Shane, as insured, its certain certificate or policy of insurance No. 169,655 wherein the defendant did indemnify and insure said Ford Shane in the sum of $6,300.00 for death through external, violent and accidental means, termed an accident, which shall be occasioned by the said accident alone and independent of all other causes.

### III

That in said certificate or policy of insurance, Elizabeth Shane was the duly designated beneficiary and the person entitled in case of death by accident under the provisions of said policy to receive payment thereunder.

### IV

That by exhibit 5, said Elizabeth Shane did duly sell, [fol. 41] transfer and assign in writing to this plaintiff all of her right, title and interest in and to said policy or certificate, and any and all rights thereunder and proceeds thereof, with authority to enforce collection thereon and thereof and to do all necessary steps and acts to that end.

### V

That on the 8th day of May, 1931, the said Ford Shane was killed by an accident through external, violent and accidental means, termed an accident, and that his death was occasioned by said accident alone and independent of all other cases in the manner herein set forth.

VI

That at the time of the death of the said Ford Shane the said policy or certificate of insurance was in full force and effect, and he was a member in good standing in said Order and with his dues paid therein.

VII

That prior to the commencement of this action, defendant was given due notice of such death and loss and was furnished due and complete proof of death and of claim upon the blanks sent by the defendant insurer to said Elizabeth Shane, and which completed proof of death and of claim was received by the said insurer at the Home Office of the defendant corporation at Columbus, Ohio, either on June 2nd or on June 6th, 1931; and that said Elizabeth Shane and this plaintiff, prior to the commencement of this action, duly performed all conditions required by them to be performed under the said policy, and defendant has completely neglected, failed and refused to pay this defendant the amount due under this certificate or policy of insurance.

VIII

That on May 8, 1931, the said deceased, Ford Shane, went to the offices of Drs. Doyle & Janis at Rapid City, South Dakota, where a clinic was being conducted for the purpose of securing a physical examination of the posterior urethra; that Dr. A. J. Janis, the person who was to make said examination did, in order only that such examination might be conducted with as little discomfort to the patient as possible and in keeping with approved surgical and medical practice administered butyn, a drug having the same character and qualities as novocaine, as a local anaesthetic.

IX

That the said A. J. Janis was at such time a duly and regularly licensed physician in the State of South Dakota, and a physician and surgeon duly graduated in medicine and surgery from the University of Michigan, and a regularly practicing physician and surgeon in Rapid City, South Dakota, and skilled in his profession.

X

That immediately upon the administration of the said anaesthetic the said Ford Shane went into convulsions and died within a few minutes; that such death occurred before the said examination of the urethra could be made.

[fol. 42]

XI

That the said anaesthetic so administered was the usual, ordinary and proper amount for such purposes and in such cases, and that such anaesthetic was of the usual, ordinary and proper strength; and that it was properly administered.

XII

That at the time of the administration of the said anaesthetic and of the said death, the deceased was in sound physical condition, and that insured's physical condition did not contribute to his death. That no medical or surgical treatment was given to the deceased and that the said examination did not necessarily include the administration of such anaesthetic.

XIII

That the said local anaesthetic was not administered at the request of the deceased, and that the deceased did not know that such anaesthetic was going to be administered.

XIV

That at the time of the administration of said local anaesthetic the deceased had present an idiosyncracy to butyn, which said idiosyncracy was not discoverable by any test or examination and is and was so exceedingly rare that it is not taken into account as a danger in administering the said anaesthetic.

XV

That the said idiosyncracy for the said anaesthetic caused it to act in an unusual and unexpected manner, and in a manner which does not ordinarily follow and cannot be reasonably anticipated from the use thereof, and in a manner which was not intended or designed, and in a manner which was not the natural and probable consequence of such administration of butyn; that death does not ordinarily

follow and cannot be reasonably anticipated from such use of said drug; and that said death resulted on account of the said idiosyncracy. That the sole and proximate cause of the said death was such administration of said butyn to the body of deceased when deceased had such unknown idiosyncracy.

XVI

That such accident left upon the body of the deceased an external visible mark of such accident.

XVII

That an idiosyncracy of the nature of the one mentioned herein is not a bodily infirmity.

XVIII

That the death of said Ford Shane did not result from medical, mechanical or surgical treatment which was being administered to him at his request nor did it result from the intentional taking of medicine or drugs on the part of said Ford Shane, as contemplated by the terms of the said policy or certificate of insurance.

[fol. 43]

XIX

That the presence of an idiosyncracy or susceptibility to said anaesthetic on the part of the said Ford Shane was unforeseen and unexpected, in addition to being unusual and rare; and that the means which caused the death of said Ford Shane were, by reason of the said idiosyncracy, not as the insured intended or expected.

XX

That the natural and probable effect of butyn administered in the manner and in the quantity used is to induce local anaesthesia without injury to the patient; that the deceased's idiosyncracy or susceptibility to said anaesthetic was unforeseen, unknown and unexpected.

XXI

The evidence wholly fails to show that the death of Ford Shane resulted from medical, mechanical and surgical treatment, nor from the intentional taking of medicine and drugs, but that the immediate cause of death was the said idio-

syncracy and the result was the paralysis of the respiratory center; and that the result was not such as follows from ordinary means voluntarily employed in a not unusual or unexpected way.

XXII

That by the stipulation and order which are a portion of exhibit 10 the parties hereto did, prior to the commencement of this action, duly agree that the action in the District Court of the United States for the District of South Dakota in which Elizabeth Shane was plaintiff and The Order of United Commercial Travelers of America, a corporation, was defendant, and which action involved this policy of insurance might be and it was dismissed without prejudice to the commencement of another action.

Conclusions of Law

Wherefore, the Court concludes as a matter of law:

I

That plaintiff's right of action is not barred because he did not commence this action within six months from the date the claim for such benefits were disallowed by the Supreme Executive Committee; nor is plaintiff estopped to assert that the period for commencing action is not a reasonable time; and that this action was commenced within the time provided by the statutes of the State of South Dakota.

II

That the matters sued upon herein are not res adjudicata and the plaintiff is not estopped from litigating the same herein.

III

That the death of the insured, Ford Shane, was the result of external, violent and accidental means termed an accident within the meaning and contemplation of said policy or certificate of insurance; and that said death was occasioned by the said accident alone and independent of all other causes.

[fol. 44]

IV

That judgment be entered accordingly in favor of the plaintiff, Edward C. Wolfe, and against the defendant, The

Order of United Commercial Travelers of America, a corporation, upon all of the issues and for the sum of $5,000.00 with interest thereon at 7% per annum from June 8, 1931, the date the claim under said policy was disallowed by defendant, to July 1, 1933, and with interest on said $5,000.00 after July 1, 1933, at the rate of 6% per annum; and that judgment should be entered in favor of the said plaintiff and against the said defendant upon all of the issues and for the further sum of $1300.00, that being the amount due under said policy of insurance payable in weekly installments at the rate of $25.00 each, with interest on each such installment at the rate of 7% per annum from June 8, 1931, to July 1, 1933, and with interest thereon at the rate of 6% per annum from July 1, 1933, such interest to be after each such respective installment shall have become due and payable; together with plaintiff's costs and disbursements of this action.

Dated at Rapid City, South Dakota, this 1st day of January, 1944.

By the Court,

Turner M. Rudesill Judge.

Attest:

W. B. Andrus, Clerk. (Seal.)

[File endorsement omitted.]

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[fols. 45-47] In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, Within and for Pennington County

Edward C. Wolfe, Plaintiff,

vs.

The Order of United Commercial Travelers of America, a Corporation, Defendant

Judgment—Filed April 4, 1944

The above entitled action having been duly submitted to the Court, Hon. A. R. Denu, Judge, without a jury on the 5th day of February, 1942, plaintiff appearing by his at-

torney H. F. Fellows and the defendant appearing by its attorney Byron S. Payne and the said A. R. Denu having died prior to the rendition of a decision herein and it being then duly stipulated between the said attorneys that the issues herein might be submitted for determination and decision to Hon. Turner M. Rudesill, the present Judge of the Circuit Court of the Seventh Judicial Circuit upon the record of the action as it was made up for submission to the said A. R. Denu, Judge; and the said Turner M. Rudesill, Judge, having examined the record and the briefs submitted by the respective parties, and being fully advised in the premises and having made and filed findings of fact and conclusions of law constituting the decision herein; now, therefore, upon motion of H. F. Fellows, attorney for plaintiff:

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Edward C. Wolfe, have and recover judgment against the defendant, The Order of United Commercial Travelers of America, a corporation, for the sum of $5,000.00, principal sum with interest thereon at the rate of 7% per annum from June 8, 1931, the date the claim under said policy was disallowed by defendant, to July 1, 1933; and with interest on said $5,000.00 after July 1, 1933, to the date hereof at the rate of 6% per annum, making a total of such principal and interest in the sum of $8,946.87;

It Is Further Ordered, Adjudged and Decreed that plaintiff, Edward C. Wolfe, have and recover judgment against defendant, The Order of United Commercial Travelers of America, a corporation, for the further sum of $1300.00, that being the amount due under said policy of insurance payable in weekly installments at the rate of $25.00 each with interest on said sum of $1300.00 from September 8, 1932, that being the date upon which the last of said weekly installments was due and payable at the rate of 7% per annum from September 8, 1932, to July 1, 1933; and with interest on said $1300.00 after July 1, 1933, to the date of this judgment at the rate of 6% per annum, making a total of principal and interest on said weekly payments in the sum of $2,214.30;

It Is Further Ordered, Adjudged and Decreed that said plaintiff shall have judgment against said defendant for the sum of $15.00 costs and disbursements to be hereinafter

inserted by the Clerk of this Court, making a total judgment for principal, interest and costs in the sum of $11,176.17.

Dated at Rapid City, South Dakota, this 1st day of April, 1944.

By the Court.

Turner M. Rudesill; Judge.

Attest:

W. B. Andrus, Clerk. (Seal.)

[File endorsement omitted.]

(Here follows 2 photolithograph, side folios 48, 49-97)

INCORPORATED UNDER THE GENERAL LAWS OF THE STATE OF OHIO.

CLASS A

# Insurance Certificate

## The Order of United Commercial Travelers

OF AMERICA

COLUMBUS, OHIO.

COPY

*An Association incorporated under the laws of the state of Ohio, hereby certifies that* Ford Shaw, *a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an*

*Insured Member of said Order under "Class A," beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such "Class A" Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date*

*This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects*

COPY

**In Witness Whereof**, *we have affixed our signatures and the seal of the Supreme Council, at*

*Columbus, Ohio, this* 21st *day of* December *A. D. 192*2.

THIS CERTIFICATE SUPERSEDES ALL INSURANCE CERTIFICATES ISSUED OF A PRIOR DATE BEARING THIS NUMBER.

Frank J Rosen

*Supreme Counselor.*

Walter D. Murphy

*Supreme Secretary*

# COPY OF APPLICATION

**Form N**

**This Application to be Used for Reinstatement of Members who Have Been Suspended or Withdrawn.**

## The Order of United Commercial Travelers of America.

## APPLICATION

For reinstatement to membership as provided by Article IV, Sections 5 (Withdrawals) and 8 (Suspensions), and for Insurance as provided by Article VII, Sections 9 and 10.

To. Black Hills Council, No. 516 of Rapid City S. D.

Desiring to be reinstated to membership in, and to be insured by THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, I hereby deposit the requisite fees therefore (Two ($2.00) Dollars of which fee shall be deposited in the Assessment Fund), and I agree that my membership and insurance shall be based upon the following statement of facts, each and all of which are warranted by me to be true. I hereby subscribe for The Sample Case and stipulate that of the 25 per cent. retained from my assessments each year for the General Expense Fund, 50 cents shall be for a year's subscription to The Sample Case.

1. Name in full Ford Shane

Place of birth Mason City Iowa

Date of birth—Month August Day 9th

Year 1882 Age 40 Weight 186 Height 5' - 10"

Residence—Street Box 436 City Rapid City

State S. D.

ADDRESS WHERE YOU DESIRE YOUR MAIL SENT

Box 436 Rapid City S. D.

2. By whom are you employed? John Morrell Co.

Location—Street

City Sioux Falls State S. D.

3. In what capacity are you employed? (If more than one, state all) Traveling Salesman

State specifically the actual duties of your occupation or occupations

Selling meat to dealers

NOTE:—By the Statutes of Ohio, "the payment of death benefits shall be confined to the wife, relatives by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, step-father, step-mother, step-children, children by legal adoption, or to a person or persons dependent upon the member," and no certificate shall be made payable to "myself," "my estate," "my heirs" or "persons named in my will" or to any beneficiary other than designated by the statutes above cited.

4. Payment in case of death by accident under the provisions of the Constitution shall be made to

Beneficiary's christian and surname in full Elizabeth A Shane

Residence—Street

City Mt Vernon State S. D.

Whose relationship to me is that of Mother

5. To what Council did you belong? Black Hills No. 516

Are you suspended? Yes or withdrawn?

6. Have you ever been ruptured? No If so, do you wear and will you continue to wear a properly fitted truss?

7. Have you lost a hand or foot or are you crippled or deformed? No

If so, give full particulars

8. Is your sight or hearing impaired? No If so, give full particulars

9. Have you had Inflammatory Rheumatism, Lumbago, Syphilis, Ulcers, Varicose Veins, Cancer, any disease or disorder of the Brain, Cerebral, Meningeal or Spinal Hemorrhage, Paralysis, Locomotor Ataxia, Apoplexy, Epilepsy, Fits, Diabetes, Bright's Disease, Heart Disease, Appendicitis, or Tuberculosis in any form? No If so, give name of disease or diseases and full particulars

NOTE:—If you have had appendicitis, have you been operated upon successfully?

Date of operation

10. Do you now, or have you ever used spirituous or malt liquors to excess? No

Do you use Morphine, Opium, Cocaine, Chloral or any other narcotic?

If so, give full particulars

11. Has any Company, Association or Organization engaged in insurance rejected your application, cancelled your membership or policy, declined to reinstate you or requested you to resign? No If so, give full particulars

12. Have you any other accident insurance? Yes If so, in what companies or organizations and for what amount?

Q. C. M. A. $5.000.00

Have you named each and all of them? Yes

13. With what companies, associations or organizations, if any, have you filed claims?

None

Have you named them all? Yes

I HEREBY AGREE, With the said Order that I will comply with all the requirements of its Articles of Incorporation, Constitution, laws, rules and regulations, and that any misstatement or concealment of any fact shall cause a forfeiture of my membership and insurance in said Order, and shall also cause, as to myself, and my beneficiary or beneficiaries a forfeiture of all rights to indemnity, and to the recovery of anything whatsoever on account of any Certificate of Membership or Insurance which may be issued to me by said Order. I also agree to accept the Certificate of Insurance issued upon this Application, subject to all the provisions, conditions and limitations of the Constitutions, laws, rules and regulations of said Order as they now exist or as they may hereafter be added to, revised or amended. I hereby agree that a Certificate of Insurance issued to me shall not cover any loss, disability or death which may happen while I am under the influence of, or in consequence of having been under the influence of any intoxicating drink, or narcotic or either of them. I also agree and request that any physician, while acting in a professional capacity, may disclose or testify to any information which he may have acquired or shall hereafter acquire concerning my mental or physical condition, waiving all provisions of law to the contrary. I also agree that said Order shall not be liable for any accidental injury or death happening prior to the issuance of a Certificate of Insurance by said Order.

Ford Shane
Signature of Applicant.

Date Oct. 23, 1922

This is to certify that we are acquainted with the above named applicant and hereby recommend him for membership.

1. O. Van Wie 2. W. M. Boland
Signatures of Two Members

Received at office of Supreme Secretary Dec 12, 1922

Application accepted Dec. 21, 1922 Certificate No. 169655

NOTE.—This Application MUST be sent to the Supreme Secretary with full statement signed by the applicant, and the applicant MUST NOT BE ELECTED WITHOUT THE CONSENT OF THE SUPREME EXECUTIVE COMMITTEE, if any part of Questions Nos. 6, 7, 8, 9, 10, 11 or 12 is answered in the affirmative.

COPY

United Commercial Travelers

of America

COLUMBUS, OHIO.

## CLASS A INSURANCE

Certificate No. 169655

Name Ford Shane

Member of

Black Hills Council, No. 516

of Rapid City State S.D.

Certificate issued Dec. 21, 1922

### READ CAREFULLY

**The Provisions of the Constitution relative to insurance will be found in Articles VI, VII and VIII, a copy of which has been sent you under separate cover. Additional copies may be obtained, upon request, from your Secretary or the Supreme Secretary.**

**NOTE:**

**This is a Fraternal Beneficial Order, operating under the Assessment Plan.**

**Notices of assessments mailed to the last address appearing on the books of the Supreme Secretary shall be deemed sufficient notice for all purposes.**

[fol. 98] PLAINTIFF'S EXHIBIT No. 5

ASSIGNMENT

For a valuable consideration, receipt of which is hereby acknowledged, I, Elizabeth Shane, the designated beneficiary in and of policy or certificate #169655, issued by the United Commercial Travelers of Columbus (Ohio, on the life of Ford Shane, whose death occurred on or about May 8, 1931, do hereby sell, transfer, and assign to Edward C. Wolfe, a resident and citizen of the State of Ohio, as trustee, all of my right, title and interest in and to said policy and/or certificate, and any and all rights thereunder and proceeds thereof, for the death of the said Ford Shane, with authority to enforce collection thereon and thereof and to take and do all necessary steps and acts to that end, including authority to institute and prosecute action in his name, or in his and my name jointly, in any court of competent jurisdiction to collect the proceeds of said policy and/or certificate for the death of said insured.

Executed and entered into this 15th day of June, A. D., 1934.

Mrs. Elizabeth Shane.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Before me, a Notary Public, in and for said County and State aforesaid, appeared Elizabeth Shane, personally known to me, and executed and acknowledged the foregoing assignment as her voluntary act and deed.

H. F. Fellows, Notary Public in and for Pennington County, South Dakota. My commission expires Aug. 30, 1935. (Seal.)

STATE OF OHIO,
County of Cuyahoga, ss:

Before me a Notary Public in and for said State and County aforesaid, appeared Edward C. Wolfe, personally known to me, and on his oath acknowledged and deposed that he is a resident and citizen of the State of Ohio; and executed, accepted and acknowledged the foregoing assignment as his voluntary act and deed, this 4th day of May, 1936.

H. F. Fellows, Notary Public. My Commission expires —— ——. (Seal.)

[fol. 99] PLAINTIFF'S EXHIBIT NO. 6.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant.

STIPULATION

It is hereby stipulated and agreed between the undersigned who are attorneys for the respective parties hereto as follows:

1. That the testimony taken at the trial of the case of Elizabeth Shane vs. The Order of United Commercial Travelers of America in the United States District Court for the Western Division of the District of South Dakota may be used as evidence upon the trial of the above entitled action, and for that purpose the printed transcript of the record in the United States Circuit Court of Appeals in said Shane case may be used.

2. That the parties hereto shall divide the expense of securing certified copies of the records in the office of the District Court of the United States for the District of South Dakota in said Shane case relating to all proceedings in such case had after decision of said Court of Appeals.

3. That the written assignment of the cause of action herein from Mrs. Elizabeth Shane to the plaintiff Edward C. Wolfe dated June 15, 1934, a copy of which has been heretofore furnished defendant's counsel, may be introduced in evidence without the necessity of taking any foundational testimony.

4. That a jury herein is hereby waived and this action may be tried to the court without a jury.

5. That the entire printed record upon appeal in said Shane case may be used by either party hereto upon the

trial hereof in lieu of the production of any testimony or exhibits therein contained.

Dated at Rapid City, South Dakota, this 1st day of October, 1934.

H. F. Fellows, Attorney for Plaintiff; Sutherland & Payne, Attorney for Defendant.

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[fol. 100] PLAINTIFF'S EXHIBIT No. 7.

IN CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERICAL TRAVELERS OF AMERICA, a Corporation, Defendant

STIPULATION

It Is Hereby Stipulated by the Plaintiff, through his attorney, H. F. Fellows, that A. W. Franklin and E. W. Dillon, if called as witnesses for the Defendant in this action, would testify as follows:

1. That they are officers of the defendant corporation, and that The Order of United Commercial Travelers of America, Defendant herein, is, and at all the times involved in this action was, a fraternal beneficiary order, association or society, organized under the Laws of the State of Ohio.

2. The application for the insurance certificate number 169,655, issued by the Defendant corporation to Ford Shane on August 19, 1920, was signed and made by the said Ford Shane in South Dakota; that the application to reinstate the said insurance certificate was signed and made by the said Ford Shane in South Dakota. That both of said applications were forwarded to the Defendant corporation at Columbus, Ohio, and the original certificate of insurance and the reinstatement certificate, dated December 24, 1922, were, alike, signed and executed by the officers of the

Defendant corporation at Columbus, Ohio, and were forwarded by the said Defendant corporation to South Dakota for delivery to the insured, the said Ford Shane.

3. That after the death of the said Ford Shane, on or about May 8, 1931, the beneficiary of said insurance, Elizabeth Shane, presented her claim, to the defendant corporation for the benefits of insurance provided for by said certificate, together with Proofs of Death of said Ford Shane in support thereof. After receipt of such claim and Proofs of Death, and on June 8, 1931, the Supreme Executive Committee refused and disallowed the claim for insurance on the life of the said Ford Shane; and, on June 11, 1931, a letter was duly [fol. 101] mailed by United States Mail to Mrs. Elizabeth Shane, said beneficiary, at Mt. Vernon, South Dakota, advising her that the Supreme Executive Committee of the Defendant corporation had disallowed claim for such insurance.

It Is Further Stipulated, on the part of the Plaintiff, that this Stipulation may be introduced and received in evidence at the trial of this action, without further foundation, as the testimony of said witnesses.

Dated this 29 day of Nov. 1941.

H. F. Fellows, Attorney for Plaintiff.

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[fols. 102-103] DEFENDANT'S EXHIBIT No. 8

These Articles of Incorporation of The Order of United Commercial Travelers

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be Order of United Commercial Travelers.

Second. Said corporation shall be located, and its principal business transacted at Columbus, in Franklin County, Ohio.

Third. The purpose for which said corporation is formed is

First. To unite fraternally all Commercial Travelers of good moral character.

Second. To give all moral and material aid in its power to its members and those dependent on them. Also to assist the widows and orphans of deceased members.

Third. To establish an "Indemnity Fund" to indemnify its members for total disability or death resulting from accidental means.

Fourth. To secure from all Transportation Companies and Hotels, just and equitable favors for Commercial Travelers as a class.

Fifth. To elevate the moral and social standing of its members.

Sixth. Said corporation shall be a Secret Order.

In Witness Whereof, We have hereunto set our hands, this fourteenth day of January, A. D. 1888.

John C. Fenimore, L. C. Pease, S. H. Strayer, Willis E. Carpenter, John Dickey, C. S. Ammel, F. A. Sells.

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[fol. 104] UNITED STATES OF AMERICA, STATE OF OHIO,
Office of the Secretary of State:

I, John E. Sweeney, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of Order of United Commercial Travelers filed in this office on the 14th day of January, A. D. 1888, and recorded in Volume 37, Page 303, of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this 17th day of November, A. D. 1941.

John E. Sweeney, Secretary of State. (Seal.)

[fols. 105-133] DEFENDANT'S EXHIBIT No. 9

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 9510

At Law

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Appellant,

vs.

ELIZABETH SHANE, Appellee

Appeal from the District Court of the United States for the District of South Dakota

TRANSCRIPT OF RECORD—Filed April 25, 1932

[fol. 134] TESTIMONY OF DR. ANTON J. JANIS

ANTON J. JANIS, produced as a witness on behalf of plaintiff, testified as follows:

Direct examination:

My name is Anton J. Janis. I am a physician and surgeon, practicing at Rapid City, South Dakota. Was so practicing there on May 8th, 1931, and prior thereto. I am regularly licensed as a physician and surgeon in South Dakota, and a graduate of the college of medicine of the University of Michigan. I knew Ford Shane, the deceased, on May 8th, 1931. At that time I was connected in the practice as a physician and surgeon with Dr. Manson. I am now connected with Dr. Doyle, and was connected with Dr. Doyle on May 8th. I have been regularly associated with Dr. [fol. 135] Doyle in the practice of medicine in Rapid City, South Dakota. He and I have a common waiting room, and each a private office on opposite sides thereof.

I knew Ford Shane prior to May 8th, 1931. On that day he came to my office for an examination. He complained of urinary difficulties; he came there to see whether he had a stricture or not. At that time I attempted to make an examination for stricture; what I call a stricture of the posterior urethra. Dr. Manson was present in my office assisting in

this examination. The purpose of making the examination was to give treatment, if the condition disclosed necessitated treatment. Dr. Manson was then holding a clinic to give treatment, if the examination of certain patients, including the deceased, showed the necessity of such treatment; he would give treatment, if necessary.

The deceased came to the office about one fifteen in the afternoon. He was in apparent good health. By way of making the examination, he was placed on the surgical table,—regular genitary urinary table, and about four cc's of butyn was administered with a catheter by insertion in the urethra.

This was prior to the examination. About a minute or so after the installation of the butyn, the patient became rigid and slightly synotic. By synotic, I mean he was blue; his entire face had a sort of bluish hue. He had one convulsion; that is, I mean his entire body was rigid and it shook. And after this he had another convulsion. I then saw the patient was in a critical condition, and so I ran out and had a syringe ready. I got some adrenaline and put about five cc's of this in a syringe, and gave it to him immediately. As soon as I got through doing this, I got a two-way catheter and introduced that into his bladder and irrigated his bladder as fast as I could. That was to get all of the solution out of the bladder, or whatever got into the bladder, and from that time on, of course, I don't know how many convulsions he really had, but he had a succession of convulsions. Then his respiration practically ceased, so I gave him artificial respiration for quite a long time, and after that I alternated until the patient could not be revived.

Butyn is a cocaine derivative. It is used for a local anaesthetic. It has a tendency to numb the tissues when it comes in contact with the tissues. It acts the same as novocaine. It is practically the same except it's a trade name. I administered four cc's. I had a one per cent solution, and I usually cut the solution in half with distilled water. This is the solution I use. These were general convulsions. A succession of them, I counted at least three.

[fol. 136] The examination I was conducting did not include the administration of such an anaesthetic necessarily, or as an essential part of it. The purpose of giving the local anaesthetic is to be not too brutal to the patient, to make the examination more easy. Such an examination is made a great many times without the administration of such an an-

aesthetic; it is done daily. The surgical treatment or such examination does not depend at all upon the anaesthetic. The effect of this (anaesthetic) was not the usual effect which followed the use of such anaesthetic in such quantities and mixture. The effect was not one that could have been reasonably anticipated from the use of such mixture. He had the first convulsion about a minute and a half or two minutes after the administration of the anaesthetic. He had a succession of convulsions. He died about two minutes after.

After his death I observed blood coming from his tongue, indicating he had bitten his tongue in one of his convulsions, but otherwise the body had no marks. Patients usually bite their tongue as the result of such convulsions. This butyn was not administered at the request of Mr. Shane. I believe I stated to him that I was going to deaded his urethra for him.' I did not state what I was going to do. He did not make any inquiry of that kind. He did not request me to administer any local anaesthetic.

The cause of the convulsions which I have testified to was probably due to the idiosyncracy of the drug, the butyn. It is impossible to give an exact definition of idiosyncracy, but it is a peculiar phenomenon that happens with an organism that generally results in death in a very short while, and generally due to respiratory paralysis. It is peculiar in the organism itself. It is not a bodily infirmity or physical infirmity of any kind. (Question by counsel) Is it or is it not a term used to describe the behavior of the body when brought in contact with the drug? (Answer) Yes. There is no method that I know of by which such an idiosyncracy could be ascertained by the physician prior to the administration of the drug. There is no test to my knowledge that has ever been discovered. The patient has no way of knowing of such idiosyncracy prior to the administration of the local anaesthetic of this kind. The idiosyncracy does not affect the function of the bodily organs. I think a patient would live as long with such an idiosyncracy as without it, in the absence of coming into contact with the drugs for which he has such idiosyncracy. I did not know at the time that the physical condition of the insured, aside [fol. 137] from the idiosyncracy, contributed in any manner to his death. The symptoms and the conditions which I described are the natural symptoms, natural results of an idiosyncracy when the patient comes in contact with the drug to which he has such idiosyncracy, because I have seen

one case prior to this in which the symptoms were the same. Idiosyncracy is a peculiar action of the body that nobody really can explain. It can be hyper-susceptibility, or ultra-sensitiveness. The effect produced in this instance was not the one that ordinarily followed, or could be reasonably anticipated from the use of the anaesthetic.

The immediate cause of Mr. Shane's death was the idiosyncracy, and the result that followed was probably the paralysis of the respiratory center which resulted in death. Convulsions is one of the symptoms manifested when they have paralysis of the respiratory center. The natural or proper result of butyn administered in this manner and quantity was to anaesthetize the urethra from the anterior to the posterior portion, and render the examination practically painless, and without injury to the patient. The amount and mixture of butyn as used was the proper mixture for this purpose as recognized by the medical profession, because they can use as high as two per cent. It was the mixture and amount ordinarily used by the profession for this purpose.

When I administered the anaesthetic, I was not aware of the deceased's idiosyncracy or bodily hyper-susceptibility to the drug. There was no discussion with deceased as to the nature of any anaesthetic to be used. I stated that I would deaden his urethra, as I have stated. So far as I was concerned, the examination was confined to the genito urinal tract, and there were no other physical signs that indicated he was in poor health. Physicians and surgeons and medical authorities recognize idiosyncracies of this nature. They are very rare. When a patient has such an idiosyncracy and he is brought in contact with the drug, it results in convulsions, and paralysis of the respiratory centers, and usually in death. The physical examination which I testified I was about to make was the only occasion for the use of the drug.

Dr. James I. Doyle was called into the room after Mr. Shane had the first convulsion and prior to his death. Immediately after his death, Dr. J. M. Walsh of Rapid City, South Dakota, was called; within five minutes I think.

[fol. 138] Cross-examination:

Mr. Shane came to my office with some trouble with his urinary system. He came to consult me as a physician and surgeon. He saw Dr. Doyle first; then he came into my office. Then I was making an examination of this trouble that

he came for. That was my purpose in doing what I did. I stated to Mr. Shane that I would deaden the urethra. That was for the purpose of making the examination; and seeing what treatment was necessary. Mr. Shane made no objection at the time to deadening the tract. I might have made the examination without using the deadening drug. It is a common practice to use some drug like that to lessen the pain. I knew at the time that this drug does cause the idiosyncracy; that is general knowledge with physicians, I think. I saw a case myself on a former occasion. I don't have any exact knowledge or statistics as to the frequency that result occurs, but I know it is very rare. It does occur rarely. I should say he died in about two minutes after the drug was administered. I was quite concerned and I didn't calculate the time at all.

Redirect examination:

It is not so common that it is taken into account as a danger in administering the drug.

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TESTIMONY OF DR. J. M. WALSH

DR. J. M. WALSH, produced as a witness on behalf of plaintiff, testified as follows:

Direct examination:

My name is Dr. J. M. Walsh. I am a physician and surgeon at Rapid City, South Dakota. I have practiced in South Dakota twenty-six years. I am a graduate of the school of medicine of the University of Illinois. I am duly licensed to practice in this state.

I knew Ford Shane on and prior to May 8th, 1931. I knew him very well. He had been in my office. I saw him frequently, and was quite intimately acquainted with him. On May 8th, 1931, I was called to the office of Drs. Doyle and Janis in Rapid City, South Dakota. It was right after noon. I saw Ford Shane on the operating table in Dr. Janis' office. He was dead. I examined the body. There was no physical sign or mark on the body except he was bleeding from the [fol. 139] mouth where he had bitten his tongue and lips. I examined the pupils of his eyes.

I heard the testimony of Dr. Janis as to what occurred prior to the time I came there. I am familiar with butyn and

its uses, I have not used butyn and novocaine a very great deal. They are practically the same, all but fine chemical distinctions. They belong to the cocaine group and have the same actions. They are trade names largely. Butyn and novocaine are put out for sale purposes. They are like corn whiskey and rye whiskey, a distinction rather than a difference. There is some chemical distinction, but they both act the same. They are both in the cocaine group, and depend on that group for their activity.

In my years of practice I have had experience in making examinations for strictures of the posterior urethra. I have made them a good many times. I have not used butyn or novocaine very often for that purpose. It is my practice as a rule to make them without the use of any anaesthetic. Such examination does not necessarily include the administration of either butyn or any anaesthetic. It can be made without it. It is painful. It is not a part of the examination itself, nor essential to it. The effect (of its use) is to make it more comfortable for the patient.

I know that medical authorities and physicians and surgeons recognize such a thing as an idiosyncracy or hypersusceptibility to anaesthetics of this kind, butyn and novocaine. The administration of novocaine for this kind of an examination is practically on a parity of the use of it by dentists in extracting teeth; I would say it was less necessary; the extraction of a tooth is much more painful. But the reason is the same. The idiosyncracies I have testified to are very rare. They are not a bodily infirmity; nor a physical infirmity. They do not interfere with the functions of a person's bodily organs; nor his condition of health. They are not a disease. I could not give any figures as to how rare they are. I don't know that there are such figures.

When such idiosyncracy is present it is not possible for any surgeon to tell the existence of it by tests in advance. The only way the patient may be familiar with an idiosyncracy is to have the drug administered in such small quantities that he does not die but recovers from it. Before any administration it cannot be told in any way. Idiosyncracy simply means this: it is the reaction of an individual body to this particular thing. It does not always follow that it is [fol. 140] novocaine. You get the same thing in various foods. It is well known that a person who eats strawberries may have an idiosyncracy towards them and bad results. It describes the behavior of the body; a body that reacts un-

favorably to one thing may not to another. When there is present such idiosyncracy in a person, a very small dose would produce acute poisoning. The characteristic symptoms of acute poisoning would follow any idiosyncracy. Those are acute uneasiness of the patient, abnormal heart action in which the patient becomes synotic, blue, and then convulsions which go on until death. The convulsions are successive, though they have been known to die by a single prolonged convulsion. Such a result cannot be ordinarily anticipated as following the use of such anaesthetic. The chewing of the lips, and the blue are the common result of the convulsion. They indicate when one sees the body that convulsions were present.

The amount and mixture used by Dr. Janis, as he testified, was the ordinary and proper amount and mixture as recognized by the medical profession as ordinarily used in examinations of this kind. It was a weak mixture. One-half to two per cent, his testimony was. One-half per cent of that would be perfectly safe to use, and the proper quantity. Medical authorities, physicians and surgeons generally are aware of this idiosyncracy that is present rarely. It is so rare that the authorities' recent publication made the statement that it is used actually millions of times annually in the United States, with very few direct deaths from it. I know of deaths from the idiosyncracy. It was the cause of Judge Whitings' death at Pierre not very long ago. Dr. Mead died, I think, from the same thing. Upon the testimony of Dr. Janis and my experience and knowledge, I would say the proximate, sole cause of Mr. Shane's death was acute cocaine poisoning, caused by the administration of butyn and the idiosyncracy on the part of the patient.

Cross-examination:

The purpose of injecting this drug is to deaden the pain. That is the purpose of any local anesthetic, practically always. Sometimes general anesthetic is used for muscular relaxation and such things as that. That is proper action on the part of a physician or surgeon. Today it is supposed to make it as comfortable for the patient as you can.

[fol. 141] TESTIMONY OF DR. JAMES I. DOYLE

DR. JAMES I. DOYLE, produced as a witness in behalf of plaintiff, testified as follows:

Direct examination:

My name is Dr. James I. Doyle. I am a physician and surgeon practicing at Rapid City, South Dakota. I am licensed to practice in this state. I graduated from the college of medicine of the University of Chicago. I knew Mr. Shane in his life time, nearly four years. On May 8th, 1931, he came to the office occupied by Dr. Janis and myself. Dr. Janis and I were associated at that time. I had made an appointment with him for an examination. He saw me the evening before. The examination was for stricture of the posterior urethra. He came up about five-thirty the day before for the appointment. He came to the office the next day shortly after one o'clock. He went to Dr. Janis' office. I was not there right at the time when he came, but I had seen him the evening before. I was called into Dr. Janis' office while he was there, just a minute or two before he died. Mr. Shane was then synotic, blue. It was hard to say whether his respiratories were shallow or had ceased at that time. He was in a general convulsion when I went in. I think he had three convulsions. They were so c[illegible] se together it was hard to separate them. What I would call successive convulsions. His tongue and lips were bitten. There was blood on his face. These indicated convulsions. I am familiar with the use of butyn. It is practically interchangeable with novocaine as a local anesthetic. It is of the nature testified to by Dr. Walsh and Dr. Janis.

I am familiar with making an examination for stricture of the posterior urethra. I have made them. They are made with and without local anesthetic. It is routine in offices at this date to make them with it. They are made without it. It is not an essential part of such an examination, or necessary to it; you can make it without it. It is not a part of the examination, itself. The purpose of it is to deaden the pain. The examination and surgical treatment connected with such a condition does not include in itself the administration of such an anesthetic. The surgical treatment or such an examination does not depend upon the anesthetic. In the ordinary course of the administration of such an anesthetic for such an examination, the effect that

you would get would be the patient would relax and would not complain of any pain during the examination. The symptoms I have testified are the natural result of convul- [fol. 142] sions caused by an idiosyncracy to local anesthetic. I don't know the figures on it, but I know an idiosyncracy of this kind is very rare. It is a condition recognized by medical authorities. There is no test for ascertaining the presence of such idiosyncracy prior to the use of such local anesthetic. There is no way the patient knows in advance. The result which occurred to Mr. Shane was not the one that ordinarily follows the use of such anesthetic. It was not one that could reasonably be anticipated from its use. The quantity and mixture used by Dr. Janis was the ordinary and proper amount recognized by medical authorities for use in such an examination. Basing my testimony upon Dr. Janis' testimony and my experience I would say the proximate and sole cause of Mr. Shane's death was acute poisoning followed by convulsions and idiosyncracy to butyn. I would say the idiosyncracy was the cause of the succession of events that occurred. Idiosyncracy of this nature is not a bodily infirmity. It is a descriptive term of the behavior of the body when brought into contact with the drug. I had examined Mr. Shane several times prior to May 8th, 1931. For life insurance, and I had him in an injury, a broken leg, several months ago. I made a thorough examination of him. He was in good physical condition, blood pressure normal, heart action normal. I could not find any symptoms of bodily infirmity. I saw him several times a week. He was in apparent good health on the night before his death. An idiosyncracy of this nature is so exceedingly rare that it is not taken into account as a danger in administering this drug for an examination of this kind.

Cross-examination:

But it is known that sometimes the reaction that occurred in Mr. Shane's case does occur. The purpose of giving this drug was to deaden the pain for the examination and treatment. And also to make it easier for the physician to make the examination. Relaxing tissues and muscles. The purpose is two-fold, to deaden pain and to get a relaxation of the muscles to make the examination better. This examination without an anesthetic is pretty painful. You have to go through a long duct to get into where this trouble is. The urethra lies from the bladder to the penis.

## Additional Testimony of Dr. James I. Doyle

On October 13th, 1931, the following additional testimony of Dr. James I. Doyle was taken at Rapid City, South Da- [fol. 143] kota, before Florence Patterson, a notary public, and was made part of the record in the case:

Cross-examination:

I am the Dr. James I. Doyle that testified at the trial at Deadwood in September. I saw Ford Shane the day before he died. He told me he was coming up to the office to be examined the following day. I knew that he was coming to be examined for bladder trouble, or stricture. He had told me about this trouble. I had not examined him before that, but had talked with him about it. He had not consulted me professionally about it. We were quite good friends. I did not discuss that night the examination that was to be made. I saw him the next morning for just a minute on the street. He told me he would be up at one o'clock. I saw him for a minute when he came in. I made no arrangements with him as to what would be done. He came up because we had this sort of a clinic on. Dr. Janis was then associated with me. I was then busy. Janis and Manson got ready to make the examination. I had a couple of patients with me. I told Dr. Janis that forenoon or the night before that he (Shane) was coming up to be examined and I figured he had a stricture. Some notice had been given that there was to be given a clinic for trouble of this nature. I turned him over to Dr. Janis. That was the last I had to do with Mr. Shane before he was taken with convulsions.

A stricture of the urethra is caused by scar tissue laid down in the mucous membrane in the canal from previously being affected. The scar tissue in the canal cuts the caliber or size of the canal. The canal in the average person would be two to four inches; they vary a lot. This is the canal that leads from the bladder out through the penis for the discharge of the urine. The average length when there is no erection would be four or four and a half inches. It is a curved canal. You have to have a curved instrument to get all the way back to the bladder. The purpose in making an examination of this kind is to determine whether there was a stricture or strictures present. I had never examined Mr. Shane and did not know definitely about that. It was my purpose also to locate the place of the stricture. In mak-

ing an examination, what every genital urinary office does is to anesthetize the urethra in order to make the examination less painful, and then using the various instruments for determining the location and extent of the stricture or obstruction. They usually call it (the instrument) a sound or bouzee. This sound is introduced into the canal,—into the [fol. 144] penis and brought back through the urethra. It is a highly sensitized instrument, and it is curved in such shape as to accommodate itself to the canal. I ascertain where the stricture is by the obstruction that is transmitted to my hand when I introduce the instrument. I ascertain it by reaching some obstruction in the canal. That was what I was planning to do with Mr. Shane, make that sort of an examination. An examination without an anesthetic is severe and painful, quite a lot of pain connected with it, but it is not necessary to give the anesthetic in order to make the examination. It could be stood by the patient without an anesthetic if you lie him on the table.

It is right that I had made no arrangements with Mr. Shane for treating his condition. The arrangements had proceeded simply to ascertain whether he had a stricture and its location. It is a fact that a clinic for the treatment of such trouble was then being held at my office in Rapid City. Anything that we found we would naturally advise that they have treatment. There are some of them that we are treating yet. The common and usual method is to dilate the canal at the point where the stricture is found. (With) the different sounds, starts with the small sound first, and is graduated to a thousandth of an inch. That is, I start with the smaller sound and from time to time as the treatment proceeds, increase the size of it to gradually dilate the canal to its normal size. The treatment would not be much different in its operation from the original examination. Except, when I have located it (the stricture) I introduce a sound of the proper size, and then gradually introduce larger sounds as the treatment proceeds to dilate the canal.

Mr. Shane had been a patient of mine generally. I had treated him previously for other matters, for a broken leg. I use an anaesthetic for the introduction of sounds in the treatment as well as in the original examination. The purpose in both instances is to relieve the pain, and make it more comfortable for the patient.

Redirect examination:

Before entering upon the treatment, I ascertain the actual presence of stricture by introduction of a preliminary sound. And then after I find such a stricture present I commence by using a small size, gradually working up to instruments of larger size. For the purpose of dilating it to its normal size. In making an examination to ascertain the presence of a stricture, nothing further is done than to run the sound to a point where you find the presence of one. It is a fact [fols. 145-288] that his purpose in coming here was to find whether or not he had a stricture. I suspected a stricture from his history. No arrangement for any treatments were made, other than to determine the fact of the presence of a stricture. Nothing was said as to what was to be done in case I discovered the presence of stricture. That was a matter to be determined after the examination; the examination was free, without cost to the patient. In case of the discovery of an ailment of this kind, arrangements are later made for the treatment of it. The patient was given the option of going elsewhere for treatment before the examination was made, or before the examination was even commenced. This examination is no part of the treatment for stricture.

Recross-examination:

In making the examination I not only attempted to ascertain the location of the stricture, but the extent of the stricture also. You could not determine the extent of the stricture until you went on with treatment, you see. My office was giving free examinations at that time in this respect. That was for the purpose of getting patients for treatments later. In making such examinations I was attending upon them professionally. What I meant by the free part, they were not obliged to come back if they were told there was something wrong; they could go wherever they wanted to, or they could come back for treatment. The patient has the option of withdrawing from treatment at any time he sees fit.

Redirect examination:

No treatment of any ailment for Mr. Shane was undertaken at this office prior to his death.

Recross-examination:

By that I mean nothing was done other than what I have described here.

[fols. 289-291] DEFENDANT'S EXHIBIT No. 12-A

The Order of United Commercial Travelers of America

Constitution and By-laws

Governing Supreme, Grand and Subordinate Councils

Effective Sept. 1st, 1930

[fol. 292]

Constitution

Article I

Name

Section 1. This fraternity shall be known as The Order of United Commercial Travelers of America.

Objects of the Order

Sec. 2. The objects of the Order shall be:

First. To unite fraternally all Commercial Travelers and Wholesale Salesmen of good moral character.

Second. To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members.

Third. To establish funds to indemnify its members for disability or death resulting from accidental means.

Fourth. To secure just and equitable favors for Commercial Travelers and Wholesale Salesmen as a class.

Fifth. To elevate the moral and social standing of its members.

Sixth. To establish and maintain a secret Order.

Seventh. To establish a Widows' and Orphans' Reserve Fund.

Councils

Sec. 3. For the purpose of administering the business and fraternal affairs of the Order, there shall be established and maintained subordinate Councils, Grand Councils and a Supreme Council, with such powers, rights, privileges duties and obligations as are herein provided for and as may from time to time be prescribed.

Subordinate Councils, Article II, page 4.
Grand Councils, Article V, page 46.
The Supreme Council, Article VI, page 68.

[fols. 293-312] Article II

[fol. 313] Representation

Sec. 26. Each Subordinate Council shall be entitled to one Representative in the Grand Council having jurisdiction and as many more as such Grand Council may determine, provided that the total representatives shall be apportioned among the Subordinate Councils in proportion to their membership at the end of the Subordinate Council's fiscal year.

[fols. 314-316] Article III

Funds

[fol. 317] Assessment Fund

Sec. 3. The Assessment Fund shall be created by assessments on the Insured Members of the Order in good standing, which assessments shall be paid to and held by the Subordinate Councils of such insured members until a call shall be made therefor by the Supreme Counselor as provided in Article IV, Section 1.

Distribution

Sec. 4. Whenever the Assessment Fund held by the Subordinate Councils shall be paid in under a call by the Supreme Counselor, it shall be apportioned as follows: Thirty per cent (30%) to the Death Fund; forty per cent (40%) to the Disability Fund; five per cent (5%) to the Reserve Funds, and twenty-five per cent (25%) to the General Expense Fund.

Death Fund

Sec. 5. The Death Fund shall be used only for the payment of claims for accidental death arising under Article IV, of this constitution.

[fol. 318] Article IV

Insurance

[fol. 319] The Supreme Counselor of the Order may in any given year order as many assessments and as many calls in an amount not to exceed three ($3.00) dollars each, as may be required to pay in full all valid claims against the Order and expenses incurred in maintaining the Order and conducting its business.

[fol. 320] Insurance.

Sec. 3. The Order shall indemnify its Insured Members in accordance with the terms of this Article for disability or death resulting from accidental means under two classes, namely: (A) and (B).

[fol. 321] Insured Member

Class A

Class A. Insured Members shall be indemnified in accordance with the terms hereinafter set out in this Article, against the results of bodily injury hereinafter mentioned, effected through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes.

Benefits. Class A

Maximum benefits under Class A Insurance Certificates shall be as follows:

[fols. 322-330] Item (12). For death, $6,300.00.

Five thousand ($5,000.00) dollars of which shall be paid within ninety (90) days from the receipt by the Supreme Executive Committee of satisfactory final proofs of death and thirteen hundred ($1,300.00) dollars in weekly installments of twenty-five ($25.00) dollars each beginning within ninety (90) days from the receipt of such final proofs.

[fols. 331-335] Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss.

Nor shall benefits under this Article be payable nor extend to any case of death or loss of time unless the claimant under the certificate establishes, by direct and positive proof, that said death or loss of time was caused by external violence and accidental means.

[fols. 336-396] Waivers

Sec. 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee.

No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be hereafter enacted.

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[fol. 397] In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, Within and for Pennington County

Edward C. Wolfe, Plaintiff,

vs.

The Order of United Commercial Travelers of America, a Corporation, Defendant

Transcript of Trial Proceedings—Filed June 5, 1944

The above entitled cause of action coming on regularly for trial before the Court, without a jury, in the Courtroom of the Courthouse in the City of Rapid City, County of Pennington, and State of South Dakota, on the 5th day of February, A. D. 1942, before the Honorable A. R. Denu, Judge of the above named court, present and presiding, the plaintiff appearing by his attorneys, H. F. Fellows and James W. Bellamy, both of Rapid City, South Dakota and the defendant appearing by its attorney, Byron S. Payne,

Esq., of Pierre, South Dakota, the following record was made, viz:

Mr. Fellows: Plaintiff offers in evidence Exhibit "1", which is the certificate issued by the defendant company to Ford Shane, and is the policy mentioned in the complaint, the admission of the issuance of which is contained in the Answer, together with Exhibit "2", issued on the 21st day [fol. 398] of December, 1922, in which there is a change of beneficiary from the original beneficiary; together with Exhibit "3", which is a certificate of membership in the defendant, issued to Ford Shane.

It is stipulated by and between counsel for the respective parties that Exhibits "1" and "2" contain true copies of the applications of Ford Shane for the insurance certificate issued in 1920, and for the reinstatement issued in December, 1922.

Plaintiff now offers in evidence a transcript of the testimony taken in the District Court of the United States for the District of South Dakota, Western Division, in the action of Elizabeth Shane versus United Commercial Travelers, being Number 668 W. D. at Law, which transcript consists of pages 1 to 34, inclusive, which transcript is marked Exhibit "4".

We offer in evidence Exhibit "5", which is the assignment of the cause of action from Elizabeth Shane to Edward C. Wolfe, plaintiff herein.

We offer in evidence, pursuant to stipulation between the parties, Exhibit "4-A", which is a copy of the deposition of James I. Doyle, taken in the aforesaid case in Federal District Court, and not included in the transcript.

We offer in evidence Exhibit "6", which is a stipulation between the attorneys for the parties herein, dated Octo- [fol. 399] ber 1, 1934.

We offer in evidence Exhibit "7", which is also a stipulation between the parties hereto, dated November 29, 1941.

Mr. Fellows: *Plaintiff rests.*

Mr. Payne: Defendant offers in evidence Exhibit "8", an authenticated copy of the Articles of Incorporation of the defendant Company.

Defendant offers in evidence Exhibit "9", being the printed transcript of the record of the action of Elizabeth Shane against the defendant in Federal Court.

By stipulation, Defendant's Exhibit "10" is introduced into the record, being certified copies of papers and orders in the Federal Court action brought by Elizabeth Shane.

Defendant offers in evidence Exhibit "11", being a printed copy of the Opinion of the Court of the United States Circuit Court of Appeals in the action by Elizabeth Shane, which is found reported in 64 Federal (2d), page 55.

Defendant offers in evidence Exhibits "12" and "12-A" being copies of the Constitution and By-Laws of the defendant Order, and certified to by the Secretary of the Order.

[fol. 400] For the purposes of the record, defendant offers in evidence and relies upon Section 9469 of the General Code of the State of Ohio, and also Section 9473 of the General Code of the State of Ohio, and particularly the last paragraph of the last numbered section.

Mr. Fellows: I want to make an objection to the last offer in evidence of the reliance upon the Ohio statutes mentioned in the offer, for the reason that no foundation is laid; they are immaterial and irrelevant, and constitute no defense to this action.

Mr. Payne: Do you object because the printed copies of the statutes are not produced?

Mr. Fellows: No, I don't care about the copies of the printed statutes.

The Court: You are relying on the matter of relevancy, but not the foundation?

Mr. Fellows: You can strike that part of the objection that no foundation has been laid.

The Court: Very well; the objection is overruled, and the exhibits admitted.

Mr. Payne: *The defendant rests.*

Mr. Fellows: Plaintiff offers in evidence Exhibit "13", which is a carbon copy of a letter from myself to Mr. Byron S. Payne, dated December 27, 1933; Exhibit "14", which [fol. 401] is a letter from Mr. Byron S. Payne to me, in answer to the prior letter, and which is dated January 10, 1934; Exhibit "15", being a carbon copy of a letter from myself to Mr. Payne, dated January 12, 1934; and Exhibit "16", a letter from Mr. Payne to me, dated January 18, 1934.

Mr. Payne: Defendant objects on the ground the same are entirely immaterial and irrelevant and without foundation, because there is no showing that Byron S. Payne, who conducted this correspondence, had any authority to act for the

defendant company with reference to waiving any of the provisions of the Constitution and By-Laws of the defendant Order, and for no other foundational objection.

The Court: The objection is overruled, and the exhibits are admitted.

Mr. Fellows: *Plaintiff rests.*

Both sides rest.

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[fol. 402] State of South Dakota,
County of Pennington, ss:

I, C. L. Howard, Official Shorthand Reporter within and for the Seventh Judicial Circuit of the State of South Dakota, Do Hereby Certify that the within and foregoing, being typewritten sheets numbered "1" to "5", both inclusive, is a true, correct and complete transcript of my shorthand notes of the record made during the trial of the within matter.

Dated at Rapid City, South Dakota, this 19th day of November, A. D. 1943.

C. L. Howard.

[File endorsement omitted.]

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[fol. 403] In Circuit Court of Pennington County

[Title omitted]

Assignments of Error—Filed August 4, 1944

The Defendant assigns the following as errors committed by the trial court:

(1) The trial court erred in finding that the death of Ford Shane did not result from medical and surgical treatment, and the intentional taking of medicine and drugs as defined in the certificate of insurance involved herein. (Finding XVIII, S. R. 39.)

(2) The trial court erred in failing to find and decide that the death of Ford Shane did result from medical and surgical treatment and from the intentional taking of medicine and drugs as defined in the certificate of insurance involved herein. (Def. Requested Finding XI and Conclusion of Law IV, S. R. 29 & 31.)

(3) The trial court erred in finding and holding that the death of Ford Shane was the result of external, violent and accidental means within the meaning and contemplation of said certificate of insurance here involved. Finding of Fact V and Conclusion of Law III, S. R. 38 & 40.)

(4) The trial court erred in failing to find that the death of said Ford Shane was not caused by external, violent and accidental means as the sole cause of such death as defined in the certificate of insurance involved. (Def. Requested Finding X and Conclusion of Law III, S. R. 29 & 31.)

[fol. 404] (5) The trial court erred in failing to find and decide that the contract limitation in the insurance certificate involved, which provided that no suit nor proceeding to recover any benefits under the said insurance certificate shall be brought after six months from the date the claim for such benefits is disallowed by the Supreme Executive Committee of the corporation, was vaid, and binding on the plaintiff, and that the action was barred by such contract limitation; and it was error for the court to hold otherwise than as so requested. (Def. Requested Finding XII, and Conclusion I, and the Court's Conclusion I; S. R. 29 & 30 and 40.)

. . . . . .

[fols. 405-409] (7) The trial court erred in failing to make Findings III-a and III-b requested by the Defendant, and especially to find and hold that the contract of insurance was an Ohio Contract and is governed by the law of the State of Ohio. (S. R. 32.)

(8) The trial court erred in its findings, conclusions and judgment in failing to give effect to the law of the State of Ohio in construing the insurance contract involved, in that (a) under the undisputed facts of this case, and under the Ohio law, the death of Ford Shane was not occasioned by external, violent and accidental means; and (b) in that likewise, this action was barred because not brought within six months from the disallowance of the claim by the Supreme Executive Committee of the defendant Order.

(9) The trial court erred in its findings, conclusions and judgment, (S. R. 37 & 42) because, in construing the insurance certificate and contract involved, it did not give full

faith and credit to the public acts, records and judicial proceedings of the State of Ohio in respect to the matters set forth in the preceding assignment, and the court thereby in and by its decision violated Section 1 of Article 4 of the Constitution of the United States.

(10) The trial court erred because it did not make the findings and conclusions of law requested by the defendant, for all the reasons set forth in the preceding assignments of error, and for the reason that such requested findings and conclusions were in accord with the evidence and record of the case, and in accordance with the law governing the case. (S. R. 25 & 32.)

(11) The findings, decision and judgment of the trial court were erroneous upon all of the grounds set forth in the preceding assignments. (S. R. 25 & 32.)

Byron S. Payne, Attorney for Defendant.

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[fol. 410] In Circuit Court of Pennington County

[Title omitted]

Notice of Appeal—Filed August 4, 1944

To Edward C. Wolfe, the Plaintiff Above Named, and to H. F. Fellows, His Attorney:

Please take Notice that the above named defendant, The Order of United Commercial Travelers of America, a corporation, appeals to the Supreme Court of the State of South Dakota from the judgment of the above described Circuit Court dated April 1, 1944, and filed and entered in this action on the 4th day of April, 1944, and from the whole thereof.

Dated this 31st day of July, 1944.

Byron S. Payne, Attorney for Defendant.

Service by copy of the within Notice of Appeal, together with a copy of Undertaking on Appeal, dated July 22nd, 1944, and Reporter's Transcript of the evidence and proceedings and Assignments of Error, are hereby admitted this 4th day of August, 1944.

H. F. Fellows, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 411-417] Bond on appeal for $250.00 filed Aug. 4, 1944, omitted in printing.

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[fol. 418] IN THE SUPREME COURT OF SOUTH DAKOTA

EDWARD C. WOLFE, Plaintiff and Respondent,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant and Appellant

Appeal from the Circuit Court of Pennington County, South Dakota

Hon. Turner M. Rudesill, Judge

Byron S. Payne, Pierre, South Dakota; E. W. Dillon, Columbus, Ohio, Attorneys for appellant.
H. F. Fellows, Rapid City, South Dakota, Attorney for respondent.

OPINION—Filed May 15, 1945

SICKEL, Judge:

The defendant is a fraternal benefit asspciation, incorporated and having its domicile in the State of Ohio. On December 21, 1922, it issued an insurance certificate to Ford Shane naming Elizabeth Shane, his mother, as beneficiary. The certificate provided for indemnity against bodily injuries effected through external, violent and accidental means. The indemnity provided for death was $5,000 cash, and $1300 in weekly installments of $25 each. On May 8, 1931, the insured visited a physician's office to be examined for stricture. The doctors applied a local anesthetic, preliminary to introducing a sound for exploratory purposes. The insured went into convulsions as a result of the anesthetic and died within about two minutes. The beneficiary then brought an action on the certificate in Pennington County. The case was removed to the United States District Court where it was tried resulting in a judgment for the plaintiff. Defendant appealed to the Circuit Court of Appeals where the judgment was reversed. Order of United Commercial Travelers v. Shane, 64 F. 2d 55.

The case was then remanded to the United States District [fol. 417] Court, and before any further proceedings were had the action was dismissed without prejudice, on stipulation of the parties. The beneficiary thereafter assigned her claim to Edward C. Wolfe who brought this action. Judgment was entered for plaintiff in the circuit court, and the defendant has appealed.

Appellant claims that this action was not commenced within six months from the time the claim on the certificate was disallowed, and that the claim is therefore barred. The constitution of the association was made a part of the certificate and provides:

> "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee."

This limitation is valid under the statutes and judicial decisions of the state of Ohio where the insurer has its domicile. Bartley v. National Business Men's Ass'n., 109 Ohio St. 585, 143 N. E. 386.

Respondent admits that this action was not commenced within six months from the time that the claim was rejected, but claims that the limitation fixed by the contract is void in this state, under SDC 10.0705 which provides:

> "Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

The above section of the code is a statute of general application, and it is valid. Vesey v. Commercial Union Assur. Co., 18 S. D. 632, 101 N. W. 1074; Douville v. Pacific Coast Casualty Co., 25 Idaho 396, 138 P. 506, Ann. Cas. 1917A, 112; 37 C. J., Limitation of Actions, § 45, Note 4.

The question then is whether the limitation contained in the contract, valid under the laws of Ohio where the appellant has its domicile, or the laws of South Dakota where this action was brought, are applicable in this case. If our decision is to be ruled by the contract, the action is barred. If we are to be governed by the South Dakota statute, the action is not barred. Obviously, this court will follow its own decisions and the statutes of this state, unless

if finds, as appellant claims, that the limitation contained in the contract must be upheld under the Federal Constitution, notwithstanding the laws of this state.

In Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, the following rule was stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

This rule applies to the whole field of conflict of laws. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. It is not limited by the "full faith and credit" clause of the United States Constitution in any case relating to "persons and events" within the state of the forum, Pacific E. Ins. Co. v. Industrial Acci. Com., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940, if the case involves rights which are contrary to local public policy, Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 62 S. Ct. 241, 86 L. Ed. 152; [fol. 420] Order of United Commercial Travelers v. Meinsen, (C. C. A. Eighth Cir.), 131 F. 2d 176; Anthony P. Miller, Inc. v. Needham, 122 F. 2d 710; Boyle v. Ward, 125 F. 2d 672; Kroger Grocery & Baking Co. v. Reddin, 128 F. 2d 787; Transit Bus Sales v. Kalamazoo Coaches, 145 F. 2d 804; Metropolitan Life Ins. Co. v. Haak, 50 F. Supp. 55.

The issue of law arising out of the limitation clause in this contract of insurance does not arise under the Federal Constitution nor under any Act of Congress. The defendant was, at the time it issued its certificate of membership to the insured, and at all times since has been, authorized to do business in this state as a foreign insurance corporation. The insured was a citizen of this state when he was insured by defendant, and remained such a citizen until the time of his death. The beneficiary was a resident of this state when the certificate of insurance was issued, and she has been such resident ever since. The insured died within this state, and the cause of action arose here. The action therefore relates to persons and events within this state.

The right of defendant to claim that the action is barred in this state by the terms of the contract, conflicts with SDC 1004705, quoted herein. That statute was considered in the case of Vesey v. Commercial Union Assur. Co., supra. It was held in that case that, under this statute, any stipulation in a contract which limits the time within which a party may enforce his rights thereunder, is absolutely void. That this statute is applicable to a contract made in another state and upon which an action is brought in this state was decided in the case of D. D. Powell Co. v. Larkin, 52 S. D. 245, 217 N. W. 200. There the question presented was whether an action could be brought in this state on a Nebraska contract barred by the Nebraska statute of limitations before the debtor left that state. The court said:

> "It is the general rule and the weight of authority that a statute which merely limits the time within which action may be brought upon a contract affects the remedy only, and not the right, and can have no extra-territorial effect, and will not prevent action upon the contract thereafter in the forum of some other state unless a statute of the forum so provides. * * * Whether action on the contract is barred by lapse of time must therefore be determined for the purposes of this action by the laws of South Dakota, the state of the forum, without reference to the Nebraska statute or to the existence of a bar in Nebraska."

See also Order of the United Commercial Travelers v. Meinsen, supra; Dinnie v. United Commercial Travelers, 41 N. D. 42, 169 N. W. 811; Avondale v. Sovereign Camp W. O. W., 134 Neb. 717, 279 N. W. 355; Erickson v. Order of United Commercial Travelers, 103 Kans. 831, 176 P. 989; Sternheimer v. Order of United Commercial Travelers, 107 S. C. 402, 93 S. E. 8; Hawkinson v. Order of United Commercial Travelers, (Tex. Civ. App.), 20 S. W. 2d 101.

Therefore the defendant's claim that this action is barred by the contract is contrary to the public policy of this state. So far as the Federal Constitution is concerned, the courts of this state are free to apply the statutes and decisions of this state in determining this issue.

Neither is this question ruled by the "due process" clause contained in the Fourteenth Amendment to the United States Constitution as that clause was interpreted

and applied in Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A. L. R. 701, and in the case of Hartford A. & I. Co. v. Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178. The Supreme Court held the "due process" clause applicable in those cases because under the facts, there was no occurrence in the state of the forum to which its laws could apply, and consequently there was no question of conflict of laws involved. This [fol. 421] distinction is pointed out in John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. Ed. 106.

Appellant also cites Supreme Council Royal Arcanum v. Green, 237 U. S. 531, 35 S. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771; Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384; Sovereign Camp W. W. v. Bolin, 305 U. S. 66, 59 S. Ct. 35, 83 L. Ed. 45, 119 A. L. R. 478. In those cases the United States Supreme Court held that a certificate of membership in an incorporated beneficiary society establishes a complex and binding relationship, and that the rights and obligations of the members and of the society are governed by the laws of the state of incorporation, as those laws are defined and interpreted by its courts. That rule was established before the decisions in Pacific E. Ins. Co. v. Industrial Acci. Com., supra, and in the Klaxon, Griffin and Pink cases. Apparently the rule is limited by these later decisions to cases which do not relate to persons and events within the state of the forum, and in which, therefore, no question of conflict of laws is presented.

There is a further distinction. Those cases related to substantive rights and obligations of the society and its members under the insurance certificate. Here the question is in no way related to the validity of the insurance contract. It has to do with the remedy only, and in such matters the courts of the forum are free to apply the rules of the forum, notwithstanding the "full faith and credit" or "due process" clauses of the United States Constitution. Pritchard v. Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; Klaxon Co. v. Stentor Electric Mfg. Co., supra; 37 C. J., Limitation of Actions, §§ 46 and 47.

Appellant also claims that the plaintiff is bound by the decisions of the Circuit Court of Appeals, Order of United

Commercial Travelers v. Shane, 64 F. 2d 55, and is therefore estopped from claiming that the death of Shane was occasioned by external, violent and accidental means, as provided in the insurance certificate.

After the case was reversed by the Circuit Court of Appeals and before final judgment was entered in the District Court, the action was dismissed without prejudice, on stipulation of the parties. There never was a final judgment adjudicating the rights of the parties in the federal courts. The decision of the Circuit Court of Appeals established the law of the case as to all subsequent proceedings in that action in the federal courts. However persuasive that decision might be on the questions decided, it does not govern the disposition of a new action for the same cause, brought in the state courts. Wells v. Western Union Telegraph Co., 144 Iowa 605, 123 N. W. 371; Belue v. United Commercial Travelers, 121 S. C. 179, 117 S. E. 591; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; 21 C. J. S., Courts, § 205, p. 365.

Appellant also assigns as error the decision of the circuit court to the effect that Shane's death was the result of external, violent and accidental means. The appellant's first contention under this assignment is that the rights and obligations of the members of the association under their contracts are governed by the laws of Ohio as defined and interpreted by the courts of that state.

This question is one of substantive right under the terms of a certificate of membership in a fraternal benefit society incorporated under the laws of Ohio. The laws of South Dakota do not conflict with the laws of Ohio as to this issue. Consequently the laws of Ohio will be observed, to the extent that they are found to be determinative of this question. Supreme Council Royal Arcanum v. Green, supra; Modern Woodmen of America v. Mixer, supra; Sovereign Camp W. W. v. Bolin, supra.

Many courts make a distinction between accidental means and accidental results. The case most often cited by the [fol. 422] courts and followed in Ohio is United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 S. Ct. 755, 762, 33 L. Ed. 60. In that case the insured and two companions jumped from a platform four or five feet high at

the same time and place. The companions alighted safely, but the insured suffered a stricture of the duodenum, from which he died. The question was whether the insured died as a result of accidental means, and the court said:

> "* * * If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

Another case cited in the Ohio decisions is Landress v. Phoenix Mut. L. Ins. Co., 291 U. S. 491, 54 S. Ct. 461, 78 L. Ed. 934, 90 A. L. R. 1382. In that case the facts were that the insured died as a result of a sunstroke suffered while playing golf. There the court made a restatement of the rule in the following language:

> "But it is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident,' (cases cited)—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

The court held in that case that there was nothing in the sun's rays which was unknown or unforeseen by the insured, and denied liability under the policy.

In the case of New Amsterdam Casualty Co. v. Johnson, 91 Ohio St. 155, 110 N. E. 475, L. R. A. 1916B, 1018, the insured took a cold water plunge after a horseback ride. This caused an acute dilation of the heart and a long period of disability. The Ohio Supreme Court held:

> "Heart dilation following the taking of such bath when heated is a natural result from a natural cause."

and that, as a matter of law, injury did not result from accidental means. The difficulty of applying the rules is acknowledged by the court in the following statement:

> "The separation of injuries occasioned by accidental means from those occasioned by means nonaccidental is not free from difficulty, and an attempt to logically analyze every supposable case of this character and differentiate along consectary lines would lead to some contradictions."

The next Ohio case is Burns v. Employers' Liability Assur. Corp., 134 Ohio St. 222, 16 N. E. 2d 316. There the question was whether amoebic dysentery contracted from infected drinking water is a bodily injury caused by accidental means, or a disease. The court approved the Barry and Landress cases, and held that in the case under consideration the injury was not accidental.

The Ohio Supreme Court next decided the case of Mitchell v. New York Life Ins. Co., 136 Ohio St. 551, 27 N. E. 2d 243. There the insured connected a tube to a faucet and used it to administer an enema to himself thereby bursting the [fol. 423] sigmoid which caused his death. The court concluded that under the facts shown, the means were "voluntarily and intentionally employed and in the manner intended", and that means which are thus employed are not accidental.

In the case of Hassay v. Metropolitan Life Ins. Co., 140 Ohio St. 226, 43 N. E. 2d 229, the court considered a case in which the insured was killed in an explosion which wrecked a vacant house owned by him. Action was brought to recover on an accident policy. The defense claimed that the insured voluntarily and intentionally employed the means which produced his death. That is, that he caused the explosion which wrecked the house and killed him. The jury brought in a verdict for defendant and the case was affirmed on appeal.

From these cases it may be fairly concluded that the rule announced in the Barry case, as quoted herein, is the rule in Ohio. However, there seems to be no Ohio case in which the rule has been applied to a case where a drug was injected into the body of the insured for the purpose of inducing anesthesia. The rule in such cases, established by the decisions of courts in many jurisdictions, is that, if the

natural and probable effect of the drug as administered, is to induce an anesthesia without injury to the patient, and if the patient dies as a result, because of an unforeseen and unexpected idiosyncrasy, or an unusual susceptibility to the drug, then the administration of the drug was the cause of the death and the death was produced by accidental means. Mutual L. Ins. Co. v. Dodge, 41 F. 2d 486, 59 A. L. R. 1290; Taylor v. New York L. Ins. Co., 176 Minn. 171, 222 N. W. 912; Wheeler v. Title Guaranty of America, 265 Mich. 296, 251 N. W. 408; Whateott v. Continental Casualty Co., 85 Utah 406, 39 P. 2d 733; Denton v. Travelers Ins. Co., 25 F. Supp. 556; Vollrath v. Central L. Ins. Co. of Illinois, 243 Ill. App. 181; Schleicher v. General Accident, Fire & L. Assur. Corp., 240 Ill. App. 247. Since these decisions are based on the rule established in the Barry case, and since Ohio appellate courts follow that rule, we must assume that they would make a similar application of the rule in anaesthetic cases.

There is also a rule of presumption or inference which is applicable to cases involving the question of accidental means. For example, in the Barry case the only evidence of anything unexpected or unforeseen in the jump made by insured was that it sounded to his companions as if he came down heavily on his heels. Justice Blatchford said:

> "It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not."

The judgment for the plaintiff was affirmed. In the Landress case the court said:

> "Nor do we say that in other circumstances an unforeseen and hence accidental result may not give rise to the inference that the external means was also accidental."

In the Ohio case of Hassay v. Metropolitan L. Ins. Co., supra, the court said:

> "* * * Upon a showing of death by external and violent means, the law raises a presumption that death was accidental and, upon such showing aided by the presumption a prima facie case for plaintiff is made; and that the presumption remains in the case until it is overcome by evidence to the contrary. * * * A pre-

> sumption of this kind is a rebuttable one, disappearing upon the production of evidence disclosing the opposite. * * * 'And the amount of evidence required to overcome the presumption in a given case will, in general, depend on the good sense of the jury, subject, of course, to such instruction from the court, as the case may require.'"

[fols. 424-425] Plaintiff's evidence in this case was that butyn, the anesthetic, was injected into the body of insured. This was external and violent means. The evidence also shows that death resulted therefrom and that such result was unexpected and unforeseen. The result was therefore accidental. From these facts the trial court had the right to infer that the means were also accidental. The only evidence introduced in this case by the defendant to overcome the case established by plaintiff's evidence is proof that insured voluntarily submitted himself to his physician for examination and consented that a local anesthetic be administered; that butyn was administered in accordance with proper medical practice for the relief of pain; that the proper amount and strength of the drug was used; that the insured had an idiosyncrasy toward butyn; that unexpected and injurious results followed the administration of the drug; that such a result is so rare that physicians give it no consideration as a possibility. Appellant does not dispute that the injection of the drug must be considered as external and violent nor that the result was accidental. The evidence introduced by defendant is therefore insufficient to overcome the prima facie case made by the evidence of the plaintiff.

These conclusions preclude the theory that the death of insured resulted from medical or surgical treatment, or from the intentional taking of medicine or drugs.

For the reasons stated the judgment of the circuit court is affirmed.

Roberts and Rudolph, JJ., concur.

Smith, P. J., dissents.

Polley, J., not sitting.

[fol. 426] IN THE SUPREME COURT OF SOUTH DAKOTA

Present: St. Clair Smith, Presiding Judge; Samuel C. Polley, E. D. Roberts, Herbert B. Rudolph, and Vernon R. Sickel, Judges of said Court and the officers thereof:

EDWARD C. WOLFE, Plaintiff and Respondent,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant and Appellant

JUDGMENT—May 15, 1945

This action coming on to be heard at the October A. D. 1944 Term of this Court at the Supreme Court Room in the City of Pierre, State of South Dakota, upon the merits of the case and upon oral argument by counsel, and the Court having advised thereon and filed its decision in writing.

It Is Considered, Ordered and Adjudged, that the judgment of the Circuit Court, within and for Pennington County, appealed from herein, be and the same is hereby affirmed.

And it Is Further Ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it Is Further Ordered and Adjudged, That respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at Seventy-five and 25/100 Dollars.

By the Court, St. Clair Smith, Presiding Judge.
(Seal.)

Attest: J. W. Raish, Clerk, by ————, Deputy Clerk.

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[fol. 427] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 428] Remittitur: Supreme Court, State of South Dakota. Filed June 26, 1945. J. W. Raish, Clerk.

[fol. 429] IN THE SUPREME COURT OF SOUTH DAKOTA

EXTRACT FROM DOCKET ENTRIES

June 2, 1945. Entering & Filing. Petition for Rehearing.

June 8, 1945. Entering & Filing. Answer to Petition for Rehearing.

June 26, 1945. Petition for Rehearing. Denied.

June 26, 1945. Remitted.

I, J. W. Raish, Clerk of the Supreme Court of the State of South Dakota, do hereby certify that the within and foregoing is a true and complete copy of the Entry in the Register (or Docket) of Actions in the Supreme Court of the State of South Dakota, so far as they relate to No. 8756, Edward C. Wolfe, Respondent, vs. The Order of United Commercial Travelers of America, a Corporation, Appellant, and the whole thereof.

Dated at Pierre, South Dakota, this 18th day of August, 1945.

J. W. Raish, Clerk of the Supreme Court of the State of South Dakota. (Seal.)

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[fol. 430] IN SUPREME COURT OF SOUTH DAKOTA

ORDER DENYING PETITION FOR REHEARING—June 26, 1945

I, J. W. Raish, Clerk of the Supreme Court of the State of South Dakota, hereby certify that in the Journal of the Supreme Court in which is recorded the minutes of the action of the Supreme Court, relating to matters coming before it, is an entry under date of June 26, 1945, which is as follows:—

> "8756 Edward C. Wolfe, Plaintiff and Respondent v. The Order of United Commercial Travelers of America, Defendant and Appellant. Petition for Rehearing Denied."

Said entry refers to the action of the Supreme Court upon that date on the Petition for Rehearing, which had theretofore been filed by Appellant in said matter, and is the whole

of the record of the action of the Court on such Petition for Rehearing.

Dated at Pierre, South Dakota this 18th day of August, 1945.

R. W. Raish, Clerk of the Supreme Court of the State of South Dakota.

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[fol. 431] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

[Title omitted]

STIPULATION AS TO CONTENTS OF THE PRINTED RECORD—Filed September 1, 1945

It is hereby stipulated by counsel for the respective parties that the following are the parts of the certified transcript of the record in the case, which are deemed essential to the questions presented by the writ of certiorari, and are to be included in the printed record: (References here are to the certified transcript of the record)

1. The Summons (R. 1), a statement showing the date and date of filing.

2. The Complaint (R. 2 and 3). Verification may be omitted. Admission of service of Summons and Complaint attached should be included.

3. Stipulation for filing amended Answer. (R. 13)

4. Amended Answer (R. 14 to 24 incl.) Paragraphs VIII and X and XII and XIII may be omitted; verification may be omitted. Date and date of filing should be shown.

5. Transcript of proceedings (R. 61 six pages). It is stipulated that all exhibits offered were admitted in evidence.

6. Exhibit 2, Insurance certificate (R. 45).

7. Exhibit 6, Stipulation dated October 1, 1934. (R. 48)

8. From Exhibit 9 (R. 51) include the testimony of Dr. Anton J. Janis, pp. 27-31; the testimony of Dr. J. M. Walsh, pp. 31-33; and the testimony of Dr. James I. Doyle, pp. 34-38.

9. Exhibit 5, (R. 47) Assignment of Claim.

10. Exhibit 7 (R. 49) Stipulation dated Nov. 29, 1941.

11. Exhibit 8 (R. 50) Certified copy of Articles of Incorporation. Acknowledgments on second page may be omitted.

12. From Exhibit 12-A (R. 35) Constitution of Petitioning Order. Include the following: From Article 1, Sections 1 and 2 and lines 23 through 29 of Section 3; from [fol. 432] Article II, lines 30 through 37 of Section 26; from Article III, Section 3 and lines 15 through 21 and to period in line 22 of Section 4, and lines 33, 34 and 35 of Section 5; from Article IV, lines 26 through 31 (page 30) of Section 1, lines 39 through 42 of Section 3, and lines 12 through 20 (page 32) and lines 21 through 28 (page 31) all of Section 4, and lines 14 through 18 and lines 23 through 29 on page 42 of Section 7; and Section 11 of Article IV.

13. Stipulation dated Nov. 29, 1943 (R. 36) Substance and effect may be stated.

14. Requested Findings of Fact and Conclusions of Law by Defendant (R. 25, seven pages). Paragraphs VIII and IX may be omitted.

15. Request by Defendant for Additional Findings (R. 32, three pages)

16. Order denying requested Findings. (R. 35)

17. Decision of Circuit Court. (R. 37 through R. 41)

18. Judgment of Circuit Court. (R. 42)

19. Notice of Appeal to the Supreme Court. (R. 66)

20. The undertaking for appeal may be omitted, but statement of filing included.

21. Assignments of Error (R. 62, three pages) No. (6) may be omitted.

22. Certified copy of Judgment of Supreme Court. (R. 68, three pages) The Statement of Costs may be omitted.

23. From the certified copy of the entries in the Register of Actions of the Supreme Court of South Dakota, include the entries of June 2, June 8, and June 26, 1945, relating to the Petition for Rehearing. (R. 69)

24. Certified copy of action of that Court on Petition for Rehearing. (R. 70)

25. This Stipulation, Also, the certificate of the Clerk of the Circuit Court to the Transcript of the Record.

Only such parts of the certified transcript of the record as are here designated are to be included in the printed record. The title of the action once given may thereafter be omitted, and formal parts of any paper not necessary to

its understanding may be omitted. The Clerk of this Court is authorized to include in the printed record any statement, or matters in the Transcript, to make the printed record complete.

The making of this stipulation shall be without prejudice to the right of either party to make objections to or in the certiorari proceedings.

Dated this 30th day of August, 1945.

Byron S. Payne, Attorney for Petitioner; H. F. Fellows, Attorney for Respondent; Edward C. Wolfe.

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[fol. 433] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 434] Supreme Court of the United States

Order Extending Time Within Which to File Petition for Certiorari

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 26th, 1945.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 11th day of September, 1945.

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[fol. 435] Supreme Court of the United States

Order Allowing Certiorari—Filed November 19, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of South Dakota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.